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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOE HESTER, Agent-in-Charge, Western District of Tennessee, Tennessee Alcoholic Beverage Commission,
Petitioner,

vs.

BEN McGEE d/b/a THE LIQUOR CENTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SEPTEMBER 1987

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the qualified immunity doctrine by considering allegations of motive and intent when reversing a summary judgment granted on the ground of qualified immunity.

2. Whether respondent made the showing required by *Davis v. Scherer* that he had a clearly established right in July 1979 to be free of surveillance by Tennessee officials.

3. Whether a state law enforcement officer who orders surveillance of an out-of-state liquor store that experiences a loss of sales may be held personally liable for money damages where no clearly established law proscribed the surveillance and the district court concludes that the officer's conduct was objectively reasonable and the surveillance methods were not unreasonably intrusive.

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Joe Hester petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The second opinion of the court of appeals (App. A, *infra*, pp. A1-A15) is reported at 815 F.2d 1193. The first opinion of the court of appeals (App. B, *infra*, pp. A16-A23) is reported at 724 F.2d 89. Neither the second opinion (App. C, *infra*, pp. A24-A52) nor the first opinion (App. D, *infra*, pp. A53-A86) of the district court is reported.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, p. A87) was entered on April 6, 1987. A petition for rehearing was denied on June 18, 1987 (App. F, *infra*, p. A88). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Twenty-First Amendment to the United States Constitution provides in pertinent part:

> The transportation or importation into any State, * * * of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

2. 42 U.S.C. 1983 provides in pertinent part:

> Every person who, under color of any statute, * * * of any State * * * subjects, * * *, any citizen of the United States * * * to the deprivation of any rights, * * * secured by the Constitution and laws, shall be liable to the party injured * * *.

3. TENN. CODE ANN. 57-3-401 provides in pertinent part:

> It shall be unlawful for any person, * * * to transport, * * * unstamped alcoholic beverages * * * into, * * * the state of Tennessee, in quantities in excess of three (3) gallons, * * *.

STATEMENT

Respondent Ben McGee owned a retail liquor store at West Memphis, Arkansas where lower state taxes on alcohol allowed him to sell liquor for less than competing retailers could sell it is nearby Memphis, Tennessee. McGee actively solicited customers from Tennessee by advertising his lower prices and giving directions to his store in Memphis newspapers (Tr. 58-59).[1]

A Tennessee statute prohibits the importation of unstamped (untaxed) alcohol, and the Tennessee Alcoholic Beverage Commission (ABC) had a policy, which predated both this action and petitioner's employment by the ABC, to enforce that statute through surveillance in Arkansas by Tennessee ABC agents (Tr. 28, 195-196, 215). The surveillance routine comprised ABC agents in plain clothes and unmarked cars going to Arkansas and parking within view of the liquor store,[2] watching for persons loading large quantities of alcohol into cars bearing Tennessee license tags, and following such cars into Tennessee where the arrests occurred (Tr. 82-83, 89, 269, 272-273). The surveillance and resulting arrests were ongoing in June 1979 and generated newspaper publicity which caused at least one of McGee's Tennessee customers to discontinue buying liquor at his store (Tr. 146-147, 150, 156, 186).

Petitioner Joe Hester is a retired Federal Bureau of Investigation agent who participated in surveillance through-

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1. "Tr." refers to the two-volume transcript of the trial held on June 24-26, 1985.

2. Other West Memphis liquor stores were the subject of surveillance, but McGee was the only merchant to complain (Tr. 272, 321, 324). McGee claimed the right to be free of surveillance by anyone except Arkansas authorities (Tr. 66).

out his 26 years with the Bureau (Tr. 176-177, 182). When Hester began his employment on July 1, 1979 as agent-in-charge of the Memphis area ABC office, his supervisor, who was the ABC's Director and responsible for the ABC's law enforcement personnel, responded to complaints about violations of the importation statute from Tennessee retail liquor dealers and citizens by instructing Hester to step up enforcement of the statute (Tr. 180, 194, 197, 226). Hester, in turn, instructed ABC agents Gammon and Wright, who performed the surveillance in Arkansas before Hester's employment, to step up the enforcement (Tr. 188). Hester never performed any of the surveillance (Tr. 330), and neither the ABC Director (Tr. 198) nor Hester (Tr. 274) knew McGee when they gave their respective orders to step up the enforcement.

After several of his customers were arrested for illegally importing alcohol into Tennessee (Tr. 204), McGee filed suit in October 1979 against Hester, the three ABC Commissioners, the ABC Director and agents Gammon and Wright in an Arkansas state court, claiming the defendants were interfering with his business and seeking only injunctive relief to stop the surveillance. Hester and the other defendants removed the suit to Federal District Court and McGee amended his complaint to allege a claim of deprivation of property without due process (42 U.S.C. 1983) and a pendent state law claim for intentional interference with his business, seeking compensatory and punitive damages and permanent injunctive relief[3] (App. D, *infra*, pp. A53-A54).

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3. McGee also alleged a claim of conspiracy to deprive him of his civil rights (42 U.S.C. 1985) which the district court dismissed, finding no basis for a claim of racial discrimination against the ABC agents (App. D, *infra*, p. A56).

Following extensive discovery, McGee, Hester and the other defendants moved for summary judgment; the district court denied McGee's motion and granted summary judgments for Hester and the other defendants.[4] Regarding the §1983 claim, the district court determined that *Berbiglia, Inc. v. Cheney*, 249 F. Supp. 258 (W.D. Mo. 1965), the only reported case dealing with the right of alcoholic beverage control agents of one state to enter another state for the purpose of observing and eventually arresting citizens for violation of liquor laws, had ruled in favor of legality (App. D, *infra*, p. A70), that surveillance was the most "reasonable means to enforce (Tennessee's) constitutional prerogative to control the importation if untaxed liquor" (App. D, *infra*, p. A72), that Hester ordered the surveillance for a law enforcement purpose to protect the public interest (App. D, *infra*, pp. A78-A80), and that Hester did not know of McGee or his business at the time he ordered that the surveillance be stepped up (App. D, *infra*, p. A78). The district court concluded that Hester's conduct was objectively reasonable in view of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and held that Hester was entitled to qualified immunity because he "could not and should not have known when he ordered the agents to observe Tennessee residents in Arkansas that (McGee's) constitutional rights would be violated" (App. D, *infra*, p. A75). Regarding McGee's pendent state claim for interference with his business, the district court determined that Hester's "actions were taken for law enforcement purposes in the public interest" (App. D, *infra*, pp. A79-A80).

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4. McGee voluntarily dismissed the suit as to agent Wright (App. D, *infra*, p. A54 n. 2).

that the "practice of out-of-state surveillance was part of a long and continuing policy of the Tennessee ABC to enforce the prohibition against non-taxed liquor" (App. D, *infra*, p. A78), that Hester's supervisor directed him to step up the enforcement of the law in the Memphis area and that Hester did not know of McGee or his business at the time he gave the order to step up the enforcement (App. D, *infra*, p. A78). The district court held that Hester was privileged to interfere with McGee's business (App. D, *infra*, p. A79).

McGee appealed[5] and a majority of a division of the court of appeals reversed.[6] The majority opinion distinguished *Berbiglia* on the ground that "[t]hat situation is quite different than the surveillance methods and motivation alleged by McGee" (App. B, *infra*, p. A21) and held that the objective test of *Harlow* was met because "[a]t some point, the methods of surveillance become so intrusive as to violate the clearly established property right of McGee of which a reasonable would have known" (App. B, *infra*, p. A20). The court of appeals remanded with directions that:

> . . ., the jury should be instructed to determine whether (Hester) engaged in conduct that discouraged customers from purchasing liquor at McGee's store and whether (Hester) intended such a result to flow from (his) actions. In short we feel that

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5. McGee appealed the summary judgments for Hester and Gammon, but not the judgments for the ABC Commissioners and Director. Agent Gammon died during pendency of the first appeal, leaving Hester as the sole defendant (App. A, *infra*, p. A4 n. 4).

6. A petition for rehearing was denied; no petition for a writ of certiorari was filed.

> (Hester's) conduct must be intentional and substantial if McGee is to succeed on the merits.

Ibid. The dissenting judge opined that Hester was entitled to qualified immunity and recognized that "[t]he enforcement of Tennessee law could properly have had (the) result" of discouraging customers from purchasing liquor at McGee's store (App. B, *infra*, p. A23).

On remand, the case was tried before the district court and a jury. In ruling on Hester's motion for a directed verdict, the district court "stated that it had considerable difficulty in concluding that there was any impropriety or unreasonableness in the surveillance techniques used by (Hester's) agents" (App. C, *infra*, p. A38), but, "despite its doubts with respect to both the liability and damage issues" (App. C, *infra*, p. A41) denied the motion because "[t]he clear message (from the court of appeals) is: Let the jury decide this case" (App. C, *infra*, p. A51).

The jury decided most of the interrogatories for McGee (App. C, *infra*, pp. A27-A33,) and the district court, although reiterating its doubts that the surveillance was unreasonably intrusive or that Hester could have known that the surveillance he ordered would violate McGee's rights (App. C, *infra*, pp. A41-A42), denied Hester's post-trial motion for judgment n.o.v., or a new trial, and entered judgment for McGee for $1,500 compensatory damages (reduced by remittitur from $7,573), $50,000 punitive damages, an attorney's fee of $51,462.50 (including a fifteen percent enhancement of $6,712.50), and costs of $2,455 (App. A, *infra*, pp. A9-A11; App. C, *infra*, pp. A47-A50).

Hester appealed and a majority of a division of the court of appeals modified[7] and affirmed the judgment[8] (App. E, *infra*, p. A87).

The court of appeals denied Hester's Petition For Rehearing and Suggestion For Rehearing *En Banc*, with four of the circuit judges voting to grant the petitions (App. F, *infra*, p. A88).

REASONS FOR GRANTING THE WRIT

This case presents two important questions concerning application of the qualified immunity doctrine: first, whether the court of appeals improperly considered allegations of Hester's motive and intent when reversing the summary judgment granted on the ground of qualified immunity; and second, whether McGee made the showing required by *Davis v. Scherer*, 468 U.S. 183 (1984), that he had a clearly established right in July 1979 to be free of surveillance by Tennessee officials.

This case also poses an additional, related question of whether a state law enforcement officer who orders surveillance of an out-of-state liquor store that experiences a loss of sales may be held personally liable for money damages where no clearly established law proscribed the surveillance, and a subsidiary question of whether a state

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7. The court of appeals eliminated the 15% ($6,712.50) enhancement of the attorney's fee: and reduced the costs allowed to McGee from $2,455 to $2,400 (App. A, *infra*, pp. A10-A11). The court of appeals awarded an additional $10,500 to McGee's attorneys for work on the two appeals (App. G, *infra*, p. A89).

8. The court of appeals' opinions do not discuss the issue of Hester's entitlement to qualified immunity presented in his brief filed April 13, 1986 and in his Petition For Rehearing and Suggestion For Rehearing *En Banc* filed April 18, 1987.

may elect to enforce its constitutional prerogative to control the importation of liquor through out-of-state surveillance which results in a loss of sales by an out-of-state liquor store without subjecting its officials to personal liability for money damages under federal and state law.

In considering allegations of Hester's motive and intent when reversing the summary judgment granted on the ground of qualified immunity, the court of appeals significantly deviated from the test of "objective legal reasonableness of an official's acts" laid down in *Harlow,* 457 U.S. at 819, and resurrected the subjective element of intent which this Court expressly discarded in *Harlow.* Further, the court of appeals' decisions are in sharp conflict with *Davis, supra,* because they allow McGee to overcome Hester's qualified immunity and recover damages for violation of a constitutional right without requiring McGee to show that such a right was clearly established at the time Hester ordered the surveillance. Finally, the court of appeals' decisions establish unsettling precedents which may intimidate all law enforcement officials who would use surveillance in their work because of the indefinite "at some point" standard where, the court of appeals held, legal surveillance becomes illegal surveillance, but which "point" the court of appeals failed to define or describe. The failure of the court of appeals to specify exactly what aspect of the surveillance made it unduly intrusive so as to violate McGee's rights under federal and state law will pose an intimidating restraint on all law enforcement officers who must use the indispensable investigative tool of surveillance in their work. In these circumstances, review of such important decisions by the Court is appropriate.

1. The decisions of the court of appeals, in considering allegations of motive and intent and in rejecting Hester's qualified immunity without a showing that McGee had a clearly established right, subvert the policy of the qualified immunity doctrine articulated in *Harlow* and *Davis, supra.* The qualified immunity doctrine fashioned by this Court recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages. Hester could not reasonably anticipate liability for damages because, as the district court stated (App. C, *infra,* p. A42):

> This Court knows of no case on the books which would have alerted a law enforcement officer that such surveillance tactics as were actually employed here would violate the constitutional rights of a merchant under circumstances similar to those found in this case.

Once the district court determined that (1) preexisting law permitted out-of-state surveillance by state agents to enforce liquor laws and (2) Hester "could not and should not have known when he ordered the agents to observe Tennessee residents in Arkansas that McGee's constitutional rights would be violated" (App. D, *infra,* pp. A69-A70, A75), *Harlow's* "guarantee of immunity," *Anderson v. Creighton,* 483 U.S. ....., ... (No. 85-1520, decided June 25, 1987), commanded summary judgment for Hester.

It is manifestly unjust to allow the judgment for substantial money damages against Hester to stand when preexisting law did not advise Hester of any illegality in his conduct and the controlling precedent of this Court guarantees him immunity. Clearly, the court of appeals

missapplied the principles of the qualified immunity doctrine established in *Harlow* and *Davis, supra,* and so far departed from the controlling precedent, that this is an appropriate case for this Court to correct the errors published in these reported decisions and to reaffirm the principles of qualified immunity.

2. By holding that "[a]t some point, the methods of surveillance become so intrusive as to violate [a] clearly established property right" (App. B, *infra,* p. A20), without identifying the "some point" at which lawful surveillance becomes unlawful surveillance, the court of appeals' decisions establish unsettling precedents which may intimidate all law enforcement officials who would use surveillance in their work. Significantly, the court of appeals made this ruling without analysis of the source or the limit of the right not to be the subject of surveillance. The failure of the court of appeals to specify exactly what part of the surveillance routine made it "so intrusive" as to violate a merchant's federal and state law rights will pose a troublesome source of harassing litigation to law enforcement officers who must use the indispensable investigative tool of surveillance in their work. Rightfully, the district court was "concerned about the precedential effect of this case on proper, but unpopular, law enforcement efforts" (App. C, *infra,* p. A43).

The surveillance in this case was performed in public places by Tennessee agents in civilian clothes and unmarked vehicles. The agents observed McGee's customers, recorded license plate numbers and followed certain cars back to Tennessee (App. C, *infra,* p. A38). Neither McGee nor his customers could reasonably expect any privacy in carrying large quantities of liquor out of a liquor store and

loading it into cars parked on a public parking lot.[9] What a person knowingly exposes to the public is not protected. *Katz v. United States,* 389 U.S. 347 (1967). Heretofore, law enforcement officers were thought to be entitled to see what there is to be seen and hear what there is to be heard in public places. However, the "at some point" standard of the court of appeals creates an indefinite caveat that "some" surveillance in a public place will violate a merchant's rights and will expose the officers to personal liability for money damages The court of appeals' decisions have the potential to significantly hinder the use of long-accepted surveillance methods by all law enforcement officers except those willing to risk that their surveillance will not run afoul of the indefinite "at some point" standard.

Clearness and definiteness are necessary in a standard which threatens to limit surveillance for law enforcement purposes. The question of what is permissible law enforcement surveillance of a retail store and its customers is an important one that should be undertaken by this Court if law enforcement officers are to be guided to make decisions concerning surveillance without fear of liability for damages.

3. A subsidiary question presented by the facts of this case is whether a state may elect to enforce its constitutional prerogative to control the importation of liquor through out-of-state surveillance which results in a loss of sales by an out-of-state liquor store without subjecting

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9. *Cf. Cardwell v. Lewis,* 417 U.S. 583, 590 (1974) (plurality opinion) "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."

its officials to personal liability for money damages.[10] In reversing the summary judgment, the court of appeals ignored (1) the district court's conclusion "that the authority given the states to control the importation of liquor necessarily implies justification for the use of reasonable means for enforcing such control;" and (2) the district court's determination that out-of-state surveillance was the most reasonable alternative for controlling illegal importation (App. D, *infra*, pp. A71-A72). Tennessee and other states "should not be precluded from using the most obvious, reasonable and direct method" of enforcing their liquor laws. *Ibid.* The court of appeals' decisions, if not corrected by this Court, threaten to impede the law enforcement efforts of Tennessee and other states which would enforce their laws through out-of-state surveillance. Significantly, the rationale of the court of appeals' decisions is not confined to surveillance for the purpose of enforcing liquor laws, but would apply as well to surveillance for any law enforcement purpose. The option to use out-of-state surevillance in its law enforcement program can have a significant impact on a state such as Tennessee which has eight bordering states.

This important question of whether a state may enforce rights expressly granted by the constitution through surveillance which results in loss of sales by out-of-state retail stores without exposing its officials to personal liability

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10. Alternatively, this question may be stated as what accommodation should be made between the right of a state to enforce its laws through out-of-state surveillance which indirectly results in a loss of sales by out-of-state retailers and the right, if any, of out-of-state retailers to be free of such surveillance. Public policy at least mandates an accommodation that permits a state reasonably to enforce its laws without subjecting its officials to personal liability even though an indirect result of the enforcement may be the loss of sales by retail stores.

for money damages under federal and state law is appropriate for determination by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1987

APPENDIX

APPENDIX A

(Filed April 6, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1270

Ben McGee, d/b/a The Liquor Center,
Appellee,

v.

Joe C. Hester, Agent-in-Charge, Western District of Tennessee, Tennessee Alcoholic Beverage Commission,
Appellant.

Appeals from the United States District Court
for the Eastern District of Arkansas.

No. 86-1645

Ben McGee, d/b/a The Liquor Center,
Appellee,

v.

Joe Hester, Agent-in-Charge, Western District of Tennessee, Tennessee Alcoholic Beverage Commission,
Appellant.

No. 86-1646

Ben McGee, d/b/a The Liquor Center,
Appellant,

v.

Joe Hester, Agent-in-Charge, Western District of Tennessee, Tennessee Alcoholic Beverage Commission,
Appellee.

Submitted: September 12, 1986
Filed: April 6, 1987

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

BRIGHT, Senior Circuit Judge.

These appeals bring this litigation before us for a second time. The first appeal is reported at 724 F.2d 89 (8th Cir. 1983).

The present controversy consists of three consolidated appeals, all arising from a suit brought by Ben McGee, owner of an Arkansas liquor store, against Joe Hester, Agent-in-Charge, and other members and employees of the Tennessee Alcoholic Beverage Commission ("ABC"). In his original complaint, McGee alleged, *inter alia,* that Hester and the other defendants deprived him of his property without due process and intentionally interfered with his business. In the first of the three consolidated appeals, Hester contends that the district court erred in

denying his motion for a judgment notwithstanding the special verdict, or, alternatively, for a new trial.[1] In a second appeal, Hester contests, as excessive, the district court's award of attorney's fees in the amount of $53,917.50 (fees of $44,750 plus a 15% enhancement, plus costs). In the third appeal, McGee contests the district court's denial of attorney's fees for work performed on his prior appeal to this court.

I. BACKGROUND

In 1979, ABC commenced a crackdown upon the illegal import of untaxed out-of-state liquor into the State of Tennessee. The object of the crackdown was to arrest Tennessee residents importing such liquor into the State. Ben McGee owns and operates The Liquor Center, a retail liquor store located in West Memphis, Arkansas, approximately seven to ten miles from the Tennessee border. As was his right, McGee openly solicited Tennessee customers; placing advertisements in Memphis papers that contained maps and directions to his liquor store. Apparently suspicious that Tennessee residents were purchasing liquor from The Liquor Center in order to evade the Tennessee tax, ABC, under the direction of Joe Hester, placed The Liquor Center under surveillance for four months in 1979. This litigation arose in response the methods used by Hester and the other agents to carry out their surveillance activities.

As already indicated, McGee filed a complaint alleging deprivation of property without due process of law in violation of 42 U.S.C. § 1983, and a pendent state law

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1. The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, presiding.

claim for intentional interference with his business.[2] Specifically, McGee alleged that the ABC agents engaged in intrusive surveillance tactics for the purpose of forcing him to close down his business.[3]

Initially, the district court granted the defendants' motion for summary judgment. The court determined that Hester and the other agents were not liable for violating section 1983 under the doctrine of good faith immunity of public officials set forth in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The district court refused to find the agents in violation of Arkansas state law, holding that the surveillance activities were privileged as law enforcement measures in the public interest under *Walt Bennett Ford, Inc. v. Pulaski County Special School District,* 624 S.W.2d 426 (Ark. 1981).

In the first appellate litigation (on McGee's appeal), a panel of this court reversed the grant of summary judgment and remanded the case to the district court. *McGee v. Hester,* 724 F.2d 89 (8th Cir. 1983).[4] The panel held

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2. McGee, a black man, also alleged that ABC agents Hester and others unlawfully conspired to deprive him of his civil rights pursuant to 42 U.S.C. § 1985. Upon a motion by the defendants, the district court dismissed this claim, finding there was no basis for a claim of racial discrimination against the ABC agents.

3. McGee claimed that Hester told him that he would "put him out of business." As alleged by McGee, the surveillance practices employed by ABC agents consisted of: parking ten to fifteen feet from The Liquor Center's front door for long periods of time and parking extremely close to McGee's business when no parking stalls were available; taking pictures of customers; conspicuously writing down customers' license plate numbers; following customers leaving the liquor store; coming into the store and following customers out as they left; and using the media (publicizing ABC arrests of Tennessee residents importing untaxed out-of-state liquor into Tennessee) to deter customers from purchasing liquor from McGee.

4. McGee appealed the judgment in favor of agents Hester and Ed Gammon only. Ed Gammon died during the pendency of the first appeal. Thus, the present appeal relates only to the judgment against Hester.

first that McGee was not alleging an "insubstantial claim" properly disposed of on summary judgment under *Harlow*, 457 U.S. at 818, and second, that even "[a]ssuming McGee's presentation of the facts is true, it cannot be said, as a matter of law," that Hester and Gammon "acted with a personal or disinterested motive of a laudable character." *McGee*, 724 F.2d at 92. The panel concluded that McGee had a right to have a jury determine the merits of his claims. Speaking through Judge Ross, the panel stated,

> On remand, the jury should be instructed to determine whether the appellees engaged in conduct that discouraged customers from purchasing liquor at McGee's store and whether the appellees intended such a result to flow from their actions.
>
> * * * *
>
> [W]e find that McGee also had a right to have the jury determine his pendent state tort claim.

Id.

On remand, the district court determined that these factual issues would best be determined by submitting special interrogatories to the jury. The jury answered most of these in McGee's favor, finding the following to be true: (1) Hester told McGee that he was going to put McGee out of business; (2) Hester, in directing the ABC surveillance program, had a personal, conscious intent to harm McGee or McGee's business; (3) Hester intentionally singled out McGee and his business for surveillance activities; (4) in carrying out his surveillance activities, Hester did not believe in good faith that he was not violating McGee's constitutional rights; (5) Hester instructed his agents to employ overt and intrusive surveillance techniques to frighten away legitimate customers from McGee's business; (6) the overt manner in which ABC's surveil-

lance activities were conducted resulting in frightening legitimate customers away from McGee's business; (7) ABC agents visited McGee's business one to three times per week from July 1, 1979, through October 10, 1979; (8) ABC agent Gammon parked his unmarked, government vehicle directly in front of McGee's store; (9) Hester personally directed or acquiesced in the particular surveillance tactics employed by the ABC agents; (10) McGee purposefully solicited Tennessee customers to purchase liquor from his store knowing that the customers' import of the liquor into Tennessee would violate Tennessee law; (11) McGee did not offer to indemnify Tennessee customers for losses suffered as a result of transporting liquor purchased at his store into Tennessee; (12) McGee sustained losses of $7,573 as a direct and proximate result of Hester's surveillance activities; (13) publicity surrounding ABC's arrests and surveillance, as well as customers' first hand observance of those activities, deterred prospective customers from McGee's store; (14) McGee sustained damages through the loss of Arkansas, and other non-Tennessee customers, as well as from Tennessee residents who did and did not intend to return to Tennessee with the liquor.

Because the jury answered the pertinent interrogatories in McGee's favor, the district court instructed the jury on punitive damages. After deliberation, the jury returned with a verdict for $50,000 in punitive damages.

Hester then moved for a judgment notwithstanding the special verdict or, in the alternative, for a new trial. The district court denied the motion, upheld the jury's award of $50,000 in punitive damages, and directed a remittitur of all but $1,500 in actual damages awarded by the jury. McGee accepted the remittitur in lieu of a new trial limited to the issue of compensatory and punitive damages. Thereafter, Hester filed these appeals.

II. DISCUSSION

Hester contends that the district court erred in denying his motion for a judgement notwithstanding the special verdict or, in the alternative, for a new trial, because McGee failed to make out a prima facie case for either deprivation of property or for intentional interference with his business relations. Hester argues that McGee did not prove that ABC's surveillance methods discouraged prospective customers from purchasing liquor at his store or that the agents intended such a result. Hester also contends that McGee failed to prove the existence of any damages attributable to the surveillance activities. Finally, Hester contends that the punitive damages awarded were excessive.

We are satisfied, however, that the trial court properly submitted the issues in this case to the jury, that sufficient evidence supported the jury's answers regarding liability, and that the district court did not err in denying Hester a new trial. We are satisfied also that the district court properly reduced the jury's damage award to $1,500, and entered the jury's award of $50,000 in punitive damages.

A. Sufficiency of the Evidence

In reviewing the record, we note that McGee testified that Hester told him that he wanted to put McGee out of business and that this motivated the decision to send additional agents to observe McGee's store. McGee also offered evidence to demonstrate that his store experienced a sales decline during the surveillance period. Further, an employee of McGee's establishment testified that he observed ABC agents in McGee's parking lot on several occasions and that the on-site surveillance caused McGee

to lose patronage. A customer who regularly bought liquor from McGee en route from his Tennessee to his Arkansas residence ceased patronizing McGee's store because of the media publicity surrounding ABC's arrests of McGee customers. This evidence is sufficient to support the jury's determination that ABC's surveillance methods deterred prospective customers from shopping at McGee's liquor store and that Joe Hester, the Agent-in-Charge, intended the surveillance to deter prospective customers.

No useful purpose is served by further reciting the evidence. The evidence at trial substantially tracked that previously presented to a panel of this court before it reversed the district court's grant of summary judgment of dismissal. In answer to special interrogatories, the jury resolved any disputed evidence in McGee's favor.

We determine, therefore, that the jury verdict on liability for both deprivation of property under federal law and intentional interference with a business under Arkansas law must be sustained. This court holds that the test for sufficiency of the evidence under federal and the Arkansas law are similar. *Garoogian v. Medlock*, 592 F.2d 997, 999 n.3 (8th Cir. 1979). Under the federal test, " 'a jury verdict will be sustained so long as there is 'substantial evidence' or a 'reasonable basis in fact' for the jury's conclusion.' " *DeWitt v. Brown*, 669 F.2d 516, 523 (8th Cir. 1982) (quoting *Gisriel v. Uniroyal, Inc.*, 517 F.2d 699, 701 n.6 (8th Cir. 1975)). *See also Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the Arkansas test, a " 'reviewing court is bound to examine the evidence in the light most favorable to the appellee * * * and bound to sustain the jury verdict if there is any substantial evidence to support it.' " *Devitt*, 669 F.2d at 523 (quoting *Gargooian v. Medlock*, 592 F.2d at 999). The evidence presented in this case is "substantial" under either test.

Because the evidence was adequate to support the verdict, the district court did not abuse its discretion in denying Hester's motion for a new trial. "A motion for new trial on the ground that the verdict is against the weight of the evidence is committed to the sound discretion of the trial court." *SCNO Barge Lines, Inc. v. Anderson Clayton & Co.*, 745 F.2d 1188, 1193 (8th Cir. 1984). *See also Green v. American Airlines, Inc.*, 804 F.2d 453, 454 (8th Cir. 1986). Accordingly, the jury's verdict on liability must stand.

B. Compensatory Damages

Although the jury found that McGee sustained a loss of $7,573 as a direct and proximate result of Hester's surveillance activities, the district court directed a remittitur of all but $1,500 in actual damages. The district court discovered that in fixing this damage figure, the jury considered Hester's use of the media to publicize his proper law enforcement activities. The court had specifically instructed the jury that such a use of the media was privileged. McGee accepted the remittitur in lieu of a new trial.

From our review of the record, we are satisfied that the evidence supports the jury's determination that McGee merited an award of compensatory damages in an amount at least equivalent to the reduced amount awarded by the district court and accepted by McGee.

C. Punitive Damages

In his complaint, McGee requested $250,000 in punitive damages for violation of his constitutional rights under section 1983 and $250,000 in punitive damages for intentional interferences with his business under state

law. The jury awarded $50,000 in punitive damages, but did not attach this award to either action. We therefore review Hester's claim that the jury's punitive damage award was excessive under both federal and Arkansas law.

Again, the standards are similar. This Circuit holds that an appellate court should review a jury verdict for excessiveness only when the amount creates plain injustice or a monstrous or shocking result. *Cunningham v. City of Overland,* 804 F.2d 1066, 1069 (8th Cir. 1985). *Hollins v. Powell,* 773 F.2d 191, 197 (8th Cir. 1985). Similarly, under Arkansas law, a jury verdict will be upheld unless the amount is "so great as to shock the conscience of the court" or indicates "passion or prejudice on the part of the jury." *Moore Ford Co. v. Smith,* 604 S.W.2d 943, 948 (Ark. 1980). *See also Ray Dodge, Inc. v. Moore,* 479 S.W.2d 518, 524-25 (Ark. 1972).

Sufficient evidence of ill-conduct existed in the present case to merit sending the issue of punitive damages to the jury. As an appellate court, our scope of review over a damage award is "extremely narrow" and we may not reverse except for a manifest abuse of discretion. *American Business Interiors, Inc. v. Haworth, Inc.,* 798 F.2d 1135, 1149 (8th Cir. 1986). Although the amount may seem large, we do not believe that it shocks the conscience. *See Memphis Community School District v. Stachura,* 106 S. Ct. 2537, 2542 n.9 (1986). We thus uphold the jury's punitive damage award of $50,000.

D. Attorney Fees

After careful consideration, the district court awarded McGee $44,750 in attorney's fees, plus a 15% enhancement. In *Hensley v. Eckerhart,* 461 U.S. 424 (1983), the

Supreme Court concluded that under 42 U.S.C. § 1988, the statute authorizing district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation, a "reasonable" attorney's fee equals the "product of reasonable hours times a reasonable rate." *Id.* at 434. *Hensley* also stated that "in some cases of exceptional success an enhanced award may be justified." *Id.* at 435. The record in this case does not reflect "exceptional success" meriting an enhanced award *Blum v. Stenson,* 465 U.S. 886, 898 (1984). The attorney's fees for McGee's attorney in the trial of this case will therefore be limited to $44,750, the district court's determination of a reasonable fee minus the enhancement.

The costs are also questionable. Having reviewed them, we reduce the costs to $2,400.

Finally, we turn to the issue of John W. Walker's attorney fees. Walker, the attorney who handled McGee's prior appeal to this court, is entitled to a fee for handling a prior appeal insofar as that appeal raises civil rights issues under 42 U.S.C. § 1983. He is not entitled to fees for handling the pendent tort claim. We therefore direct Walker to submit to us an appropriate and verified fee bill within fifteen (15) days of the date of this opinion. Any objection to that fee should be made by Hester's counsel within ten (10) days thereafter.

III. CONCLUSION

In summary, we affirm the judgment for liability and damages but modify the award for attorney's fees and costs. Because McGee is entitled to attorney's fees for the handling of his prior appeal to this court insofar as that appeal raised civil rights issues under 42 U.S.C. § 1983, we shall give consideration to such claim when properly and timely presented.

JOHN R. GIBSON, Circuit Judge, dissenting.

I recognize that I am bound by the panel opinion in this case, *McGee v. Hester,* 724 F.2d 89 (8th Cir. 1983), from which I also dissented, but I believe that the evidence at the second trial of this case did not satisfy the requirements set down in our earlier opinion and that the plaintiff failed to establish a submissible case.

Our earlier opinion required that the methods of surveillance be intrusive and made clear that on remand the jury should determine "whether the appellees engaged in conduct that discouraged customers from purchasing liquor at McGee's store and whether the appellees intended such a result to flow from their actions. In short, we feel that the appellees' conduct must be intentional and substantial if McGee is to succeed on the merits." *McGee v. Hester,* 724 F.2d at 92. We distinguished this case from an earlier district court case dealing with out-of-state surveillance, *Berbiglia v. Cheney,* 249 F. Supp. 258 (W.D. Mo. 1965), because in *Berbiglia* there was no contact with customers nor any attempt to deter them from making purchases. The factual basis for our earlier decision in *McGee* was the following catalog of methods and practices: "parking five to ten feet from McGee's front door for long periods of time; taking pictures of customers; conspicuously writing down customers' license plate numbers; following customers leaving the liquor store; parking extremely close to McGee's business when no parking stalls were available; and coming into the store and following customers out as they left." 724 F.2d at 90.

The district court was deeply troubled with the submissibility of the case and expressed doubt that there was an adequate evidentiary basis for the jury's answers to several of the interrogatories. Specifically, the court

doubted the evidentiary basis for the finding that the surveillances by agents of the Tennessee ABC were in fact conducted openly and overtly, and resulted in deterring or frightening away the plaintiff's legitimate customers. It finally concluded that, in this court's earlier determination, we had before us the same factual information that was developed at trial and that, accordingly, we would be satisfied that there was a proper evidentiary basis for these interrogatories.

I first observe that the catalog of facts set out in our earlier opinion appears to be taken from the complaint. Those facts, however, were not substantiated by evidence at trial. The only evidence of an agent parking directly in front of the store involved Agent Gammon, and there was no testimony at all as to how long he was parked. Tr. at 34. The other testimony dealt with cars parked farther away from the store. McGee could not identify any Tennessee agents that took pictures of his customers. He stated only that someone once told him that there was a person outside with a camera, but when McGee rushed outside, the car sped away. Tr. at 56. One of the employees testified that he saw persons in cars with what he thought were cameras and field glasses, but he could not state whether they took any photographs. Tr. at 101-103. McGee testified that he saw an older man in a car with a note pad but he could not see what the man was writing. Tr. at 38. McGee testified specifically that Agent Gammon never talked to customers and that he never saw any agents talk to customers outside the store. The only exception was when McGee himself asked an agent, in front of a customer, if he was an agent of the Tennessee ABC. Tr. at 55. One of the employees testified that an agent came into the store and walked around but didn't speak to anyone. Tr. at 85. The same employee recalled

two customers who saw the officers and said they were not going to buy any liquor. He testified that those customers had asked him about the ABC agent situation, and when he pointed out the cars with the agents, the customers said that they were not going to do business that day. Tr. at 98-99.

McGee identified two customers who saw cars on the lot: David Chaffin and Harold Shaw. Tr. at 47. Chaffin testified that he came to the store, went outside with McGee and that they noticed a car midway in the lot. Chaffin told McGee that he should try to get the cars off the lot because it was going to hurt his business. Tr. at 108. The antenna on the unmarked car was the only thing that drew his attention to it. Tr. at 110. Shaw testified to a telephone conversation in which he told McGee that McGee might lose a customer because Shaw was worried about being stopped and harassed. Tr. at 146. Also, he testified that McGee told him that the store was being watched and that the agents were taking license numbers. Tr. at 146-147.

This evidence simply falls short of supporting the jury's finding that the agents conducted surveillance openly and overtly that resulted in deterring or frightening away legitimate customers. There was no evidence that the agents contacted the customers or attempted to deter them from making purchases—facts we found important in our earlier decision. There was no evidence of the agents conspicuously writing down license plate numbers or following customers out of the store as they left. There was evidence that one customer was arrested when he returned to Tennessee after purchasing a quantity of liquor, but the evidence did not establish that the surveillance that led to the arrest was conducted openly and overtly.

While there was strong evidence of Hester's intentions, which the jury evidently believed, our earlier opinion emphasized two requirements: not only must Hester's conduct be intentional, but the agent's conduct must also be intrusive. The court today chooses to avoid careful consideration of the evidence, which falls woefully short of meeting the second requirement established in our earlier opinion.

I conclude that the district court was correctly concerned that there was not substantial evidence to support the findings of the jury. The district court submitted the issue simply because he believed that our earlier decision required him to do so. I believe that the evidence failed to satisfy the requirement laid down in this court's earlier opinion that the methods of surveillance be so intrusive as to violate McGee's clearly established property right. I would reverse and remand for entry of judgment for defendants.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

(Filed December 30, 1985)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2326

Ben McGee d/b/a The Liquor Center,
Appellant,

v.

Joe Hester, Agent-In-Charge, Western District of Tennessee; Ed Gammon, Agent for the Tennessee Alcoholic Beverage Commision,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: September 12, 1983
Filed: December 30, 1983

Before HEANEY, ROSS and JOHN R. GIBSON, Circuit Judges.

ROSS, Circuit Judge.

This action originated in the Chancery Court of Crittenden County, Arkansas, where Ben McGee filed a complaint against appellees Joe Hester and Ed Gammon, other employees of the Tennessee Alcoholic Beverage Commission (ABC), and members of the ABC. McGee alleged that defendants had unlawfully interferred with his retail

liquor business, The Liquor Center, located in West Memphis, Arkansas. The Chancery Court granted a temporary injunction on the same day the action was filed.

Shortly thereafter, defendants filed a petition for removal in the United States District Court for the Eastern District of Arkansas. On that same day, defendants filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted and lack of jurisdiction. McGee filed an amended complaint alleging deprivation of property without due process under 42 U.S.C. § 1983, conspiracy to deprive him of his civil rights under 42 U.S.C. § 1985, and a pendent state law claim for intentional interference with his business. McGee also requested permanent injunctive relief.

Upon the completion of discovery, defendants moved for summary judgment. McGee filed a motion for summary judgment on the issue of injunctive relief. The district court granted defendants' motions for summary judgment, dismissing the complaint with prejudice. McGee appeals only from that portion of the district court's order which granted summary judgment to defendants Hester and Gammon.

As this case was dismissed on motions for summary judgment, we will set out the facts in the light most favorable to McGee. McGee, a black man and Arkansas resident, owns and operates a retail establishment dealing in packaged liquor located in the city of West Memphis, Arkansas. West Memphis is approximately seven to ten miles from Tennessee. McGee contends that during a four month period in 1979, his business became the target of unlawful and unjustifiable surveillance which interferred with and obstructed his ability and right to earn a living.

The surveillance was undertaken by the ABC to crack down on the amount of liquor being illegally imported into the state of Tennessee. The methods and practices employed in conducting the surveillance consisted of: parking five to ten feet from McGee's front door for long periods of time; taking pictures of customers; conspicuously writing down customers' license plate numbers; following customers leaving the liquor store; parking extremely close to McGee's business when no parking stalls were available; and coming into the store and following customers out as they left. MeGee alleges that such intrusive tactics cast a chilling effect over the goodwill of his business thereby discouraging customers from patronizing his store.

McGee maintains that such surveillance, taken objectively, was conducted in a manner inconsistent with its purported purpose. Furthermore, McGee contends that Hester articulated a motive and intent which was inconsistent with and impermissible to the lawful pursuit of his official duties. Put more simply, McGee states that Hester told him that he would "put him out of business." Moreover, McGee contends that Gammon intentionally made his presence known to all customers to discourage them from purchasing liquor from McGee.

The standards to be applied in ruling upon a motion for summary judgment pursuant to FED. R. CIV. P. 56(c) have been clearly stated by the United States Supreme Court:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. Rules Civ. Proc.

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). To obtain a summary judgment, the movant must demonstrate the absence of any genuine issue of material fact, and the evidence submitted to the court "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The movant must show "his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Ozark Milling Co. v. Allied Mills, Inc.*, 480 F.2d 1014, 1015 (8th Cir. 1973). In determining whether a genuine issue of material fact exists, the court must give the nonmoving party the benefit of all reasonable factual inferences. *Adickes v. S.H. Kress & Co., supra*, 398 U.S. at 158-59. Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles. *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

On appeal, McGee argues that the court erred in granting summary judgment because: 1) the appellees could not avail themselves of the good faith immunity doctrine when they exceeded their lawful authority and violated his constitutional rights; and 2) under the facts alleged, the pendent tort claim would lie under Arkansas law. We agree. We feel that the district court improperly granted summary judgment as a genuine issue of material fact exists.

The district court disposed of the section 1983 claim against Hester and Gammon by employing the doctrine of good faith immunity. The good faith immunity of public officials has recently been clarified in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Originally, this defense consisted of

both an objective and subjective component. *Wood v. Strickland*, 420 U.S. 308, 321 (1975). However, in *Harlow*, the Supreme Court modified the test to include only an objective component. The Court held that this was necessary to protect government officials from excessive disruption and permit "the resolution of many unsubstantial claims on summary judgment." *Harlow, supra,* 457 U.S. at 818. Under the *Harlow* test, officials are shielded from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.; see also Wentz v. Klecker,* No. 82-2480 (8th Cir. filed Nov. 16, 1983); *Green v. White,* 693 F.2d 45, 47 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 2464 (1983).

Based upon the above principles, the district court determined that appellees could not have known that McGee's constitutional rights would be violated. We cannot agree. When the facts are viewed in the light most favorable to McGee, we do not feel that this is the "insubstantial claim" contemplated by *Harlow* to be disposed of on summary judgment. We feel that the district court erred in focusing solely on the purpose of the surveillance. At some point, the methods of surveillance become so intrusive as to violate the clearly established property right of McGee of which a reasonable person would have known. Thus, the objective test of *Harlow* has been met in this case. On remand, the jury should be instructed to determine whether the appellees engaged in conduct that discouraged customers from purchasing liquor at McGee's store and whether the appellees intended such a result to flow from their actions. In short, we feel that the appellees' conduct must be intentional and substantial if McGee is to succeed on the merits. In *Berbiglia v. Cheney,* 249 F.Supp. 258, 266 (W.D. Mo. 1965), a case which

also dealt with out-of-state surveillance by liquor agents, the court specifically stated that liability could not be found where there was no contact with customers, nor was there any attempt to deter them from making purchases. That situation is quite different than the surveillance methods and motivation alleged by McGee.

The trial court, on remand, should keep in mind that McGee was violating no Tennessee law. The violations alleged were committed by the customers after leaving McGee's place of business.

McGee also contends that the district court erred in disposing of the pendent state claim. The standards for the tort of wrongful interference with business relations are discussed at length in *Mason v. Funderburk,* 446 S.W.2d 543, 547 (Ark. 1969). In *Mason,* the following are shown to be the necessary elements of the tort: 1) the existence of a valid contractual relationship or business expectancy; 2) knowledge of the relationship or expectancy on the part of the interferor; 3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and 4) resultant damage to the party whose relationship or expectancy has been disrupted. In addition, the court strongly suggested that malice, that is, the absence of legal or social justification, was a necessary element. It is also interesting that in *Mason,* the court refused to dismiss the case on a summary judgment motion because it could not be said as a matter of law that the defendants were "engaged in the exercise of any lawful right." *Id.* at 551.

This tort was further defined in *Walt Bennett Ford v. Pulaski City Special School District,* 624 S.W.2d 426 (Ark. 1981). In *Bennett,* the court held that the defendant cannot be found liable if it is shown that the interference

was privileged. The *Bennett* court defined privilege as "an impersonal or disinterested motive of a laudable character * * *." *Id.* at 430.

The district court relied on the holding in *Bennett*, and held that the evidence in this case supported a finding that the actions were taken for law enforcement purposes in the public interest; the laws of Tennessee and the loss of revenue to its citizens. Once again we find that the focus of the district court was misplaced. Assuming that McGee's presentation of the facts is true, it cannot be said, as a matter of law, that the appellees acted with an impersonal or disinterested motive of a laudable character. According to McGee, the appellees' motive was quite personal and unlawful as they indicated to him that they wished to put him out of business. Therefore, we find that McGee also has a right to have the jury determine his pendent state tort claim.

The district court denied injunctive relief in this case because it was unconvinced that the harm complained of was present and ongoing. We agree. It appears that this issue is moot as all surveillance has ceased due to the fact that there is no longer a price differential between the two states and thus, no illegal importation into Tennessee.

For the foregoing reasons, the judgment of the district court is reversed and remanded for proceedings consistent with this opinion.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent from the court's opinion in this case. I would affirm on the basis of the district court's carefully reasoned opinion.

The district court concluded that the activity of defendants and its motivating factor was the purpose of enforcing the revenue laws of the state of Tennessee. The district court in my opinion properly concluded that Hester and Gammon could not and should not have known that plaintiff's constitutional rights would be violated.

I further believe that the court opens too wide a door when it requires that the jury be instructed to determine whether Gammon and Hester engaged in conduct that discouraged customers from purchasing liquor at McGee's store and whether they intended such a result to flow from their actions. The enforcement of Tennessee law could properly have had this result.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

(Filed January 8, 1986)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

No. J-C-79-145

BEN McGEE, d/b/a THE LIQUOR CENTER
PLAINTIFF

v.

JOE HESTER, Agent-in-Charge, Western District of Tennessee, Tennessee Alcoholic Beverage Commission
DEFENDANT

MEMORANDUM OPINION

Based upon the jury's answers to certain special interrogatories, judgment was entered in favor of the plaintiff, Mr. Ben McGee, for compensatory damages in the amount of $7,573 and punitive damages in the amount of $50,000, for a total of $57,573, on July 17, 1985. Presently pending before the Court is the Defendant's Motion For Judgment Notwithstanding The Special Verdict Or, In The Alternative, Motion For A New Trial, filed on July 29, 1985. Plaintiff's statement in opposition thereto was filed on August 22, 1985.

At the beginning of the trial the jury was advised of the issues in the case as same were reflected in the pleadings and other pretrial submissions of the parties. The jury was informed that Mr. Ben McGee, doing busi-

ness as The Liquor Center in West Memphis, Arkansas, was seeking to recover damages occasioned by losses to his retail liquor business which he contended were caused by the intrusive surveillance tactics and practices of the Tennessee Alcoholic Beverage Commission under the direction of the defendant, Mr. Joe Hester. Mr. McGee alleged that, although the stated purpose of such surveillance was to put an end to the illegal transportation of liquor across the state line into Tennessee, the actual purpose of the defendant in issuing the surveillance orders was to intentionally and maliciously harm the plaintiff by interfering with and obstructing plaintiff's business. The defendant, Mr. Joe Hester, was the agent in charge of the West Tennessee area for the Tennessee Alcoholic Beverage Commission at the time.

The plaintiff sought damages from the defendant on the basis of two different legal theories: first, that the defendant unlawfully violated plaintiff's constitutional right to earn a living by depriving him of his property without due process of law, and second, that the defendant unlawfully interfered with and obstructed his liquor store business. Specifically, the plaintiff alleged that between July 2, 1979, and December 20, 1979, agents of the Tennessee Alcoholic Beverage Commission, pursuant to orders given them by the defendant, Mr. Joe Hester, came to plaintiff's place of business approximately two or three times a week and conducted surveillance in the following ways:

1. Parking their cars at the front door of the plaintiff's place of business approximately five to ten feet from the front door;

2. Appearing to take pictures of customers coming to the liquor store;

3. Writing down license plate numbers of customers coming to plaintiff's place of business;

4. Following customers who would leave the plaintiff's place of business;

5. Carrying out the above activities from a location close to but not in the plaintiff's parking lot; and

6. Coming into the plaintiff's place of business and leaving the business to follow customers when the customers would leave the store

The plaintiff also contended that the defendant made improper use of the media to carry out his purposes.

In response, the defendant asserted by his pleadings that he was acting in a good faith effort to perform his duty to enforce the laws of the state of Tennessee. He denied that he acted for any other purpose than that of detecting violations and arresting persons who violated the law of Tennessee by importing liquor into that state without paying the Tennessee tax thereupon. The defendant denied that he had any purpose to harm plaintiff or to interfere with plaintiff's business. The defendant also denied that the surveillance activities for which he was responsible were the cause of any decrease in plaintiff's business. He further claimed that, even if the methods employed by him to enforce the law of Tennessee resulted in a decrease of the defendant's sales, such decrease was proximately caused by the independent decision of customers and potential customers not to violate the laws of Tennessee prohibiting the importation of untaxed liquor into that state. The defendant, Mr. Hester, also asserted that the plaintiff was not entitled to recover because the plaintiff himself was guilty of illegal conduct in encouraging persons to violate the law in Tennessee

concerning the importation and transportation of untaxed liquor into Tennessee.

During and at the conclusion of the trial, the Court discussed with counsel how best to submit the factual issues to the jury. The parties had tendered voluminous instructions for the Court's consideration. It was the Court's decision that the jury's work would be facilitated by submitting the case on special interrogatories since this procedure would greatly reduce the number of required instructions and also give focus to the factual issues actually raised by the evidence during the course of the trial. Under this procedure, after the facts had been resolved by the jury, the Court could apply the law and enter judgment accordingly. The interrogatories submitted to the jury and their answers are set forth as follows:

Interrogatory 1

The plaintiff Mr. McGee has testified that he telephoned Mr. Hester and complained of the actions of Mr. Gammon and another agent and that Mr. Hester then stated, among other things, that he was going to put Mr. McGee out of business. Mr. Hester in his testimony stated that he did not make that statement to Mr. McGee at any time.

Did Mr. Hester tell Mr. McGee that he was going to put Mr. McGee out of business?

ANSWER: Yes

Interrogatory 2

Mr. McGee contends that Mr. Hester, in ordering and directing the surveillance in West Memphis, had a conscious motive, purpose and intent to harm Mr.

McGee's business. Mr. Hester has testified that his sole motive, purpose and intent was to impersonally carry out his duty to enforce the law and, that although he was aware that success in enforcing the Tennessee law might reduce the sales of West Memphis retail liquor dealers, he had no conscious purpose or intent to harm Mr. McGee or his business.

Did Mr. Hester in directing the surveillance program which was carried out in West Memphis, Arkansas, have any personal, conscious motive or intent to specifically harm or damage Mr. McGee or Mr. McGee's business?

ANSWER: Yes

Interrogatory 3

Did the defendant Mr. Hester purposely and intentionally in any way single out the plaintiff and his business for surveillance activities?

ANSWER: Yes

Interrogatory 4

Did Mr. Hester in carrying out surveillances believe in good faith that he was *not* violating any of Mr. McGee's constitutional rights?

ANSWER: No

Interrogatory 5

An issue in this case is whether the surveillance of Mr. McGee's store was conducted in a reasonable manner, that is, in a manner sufficient to accomplish the legitimate purpose of enforcing the Tennessee laws without deterring or interfering with the plain-

tiff's legitimate business. Mr. Hester contends that the surveillance was intended to be performed, and was performed, in a covert, discreet and non-intrusive manner calculated to accomplish its lawful purpose without interfering with plaintiff's legitimate business. Mr. McGee contends that the surveillance exceeded its legitimate purpose in that it was intended to be, and was in fact, conducted openly and overtly with the intent and effect of deterring or frightening away customers who would have otherwise made lawful purchases.

Interrogatory A:

Which of the following do you find to be true?

.... Mr. Hester instructed his agents to do everything possible to conceal their actions and keep the surveillance discreet, covert and non-intrusive.

X Mr. Hester instructed his agents to conduct the surveillance in an overt, intrusive and open manner for the purpose of frightening away legitimate customers from Mr. McGee's business operation.

Interrogatory B:

Which of the following do you find to be true?

.... The surveillances by agents of the Tennessee ABC were in fact conducted in a covert, discreet and non-intrusive manner.

X The surveillances by agents of the Tennessee ABC were in fact conducted openly and overtly, resulting in the deterring or frightening away of legitimate customers from the plaintiff's business operation.

Interrogatory C:

Did Agents Gammon or Wright come to McGee's place of business from one to three times per week from July 1, 1979, through October 10, 1979?

ANSWER: Yes

Interrogatory D:

Plaintiff contends Mr. Gammon parked his vehicle in a parking place located directly in front of and immediately adjacent to Mr. McGee's store. Mr. Gammon denies this, asserting that he came no closer than 75 yards away from plaintiff's building.

Did Agent Gammon park his vehicle in a parking place located directly in front of and immediately adjacent to McGee's store?

ANSWER: Yes

Interrogatory 6

There is an issue as to whether Mr. Hester had personal knowledge of the surveillance tactics and procedures which were actually performed by others and whether he personally directed or acquiesced in the use of those tactics and procedures; or whether, on the other hand, the agents were acting on their own in deciding which surveillance procedures and tactics to use and engage in.

Which of the following propositions do you find to be true?

X Mr. Hester personally directed the activities of the agents with respect to the surveillance procedures and tactics which were used by them

in West Memphis, or acquiesced in the use of those tactics.

.... The agents conducting the surveillance acted on their own in deciding what surveillance procedures and tactics to use.

.... Both propositions are true.

Interrogatory 7

The defendant, Mr. Hester, contends that the plaintiff, Mr. McGee, took an active role in soliciting Tennessee residents to violate the Tennessee law by offering to indemnify Tennessee customers who might be arrested and suffer financial loss. The plaintiff, Mr. McGee, denies that he solicited Tennessee citizens to violate Tennessee law and he denies that he agreed to indemnify Tennessee customers.

Interrogatory A:

Did the plaintiff Mr. McGee actively and intentionally solicit Tennessee customers to buy liquor at his store knowing that the importation of such liquor into Tennessee by such customers would be a violation of Tennessee law?

ANSWER: Yes

Interrogatory B:

Did the plaintiff, Mr. McGee, offer to indemnify any Tennessee customers of his store who might be arrested or suffer loss as a result of buying alcoholic beverages at his store and transporting same to Tennessee?

ANSWER: No

Interrogatory 8

A. If any damage or loss was sustained by the plaintiff as a direct and proximate result of the defendant's actions, state the amount thereof.

ANSWER: $7,573.00

B. If plaintiff suffered loss, was it because publicity about arrests and surveillances deterred prospective customers, or was it because purchasers were discouraged by actually seeing and observing the surveillance tactics and procedures?

.... Publicity deterred customers

.... Customers discouraged by observation of surveillance tactics and procedures

X Both

C. If any such loss or damage was sustained by the plaintiff, was that loss the result of *Tennessee residents* deciding not to come and purchase liquor at plaintiff's place of business and return promptly therewith to Tennessee, or was it the result of the decision of *Arkansas* and *non-Tennessee* residents not to purchase liquor at plaintiff's place of business together with Tennessee residents who might purchase such liquor with no intention of taking same to Tennessee.

Choose one:

.... Tennessee residents' decisions

.... Arkansas, non-Tennessee and non-return Tennessee residents

X Both groups

After the jury answered the interrogatories, it was instructed by the Court upon the law relating to punitive damages. Thereafter the jury again retired, deliberated and returned the following verdict:

Punitive Damage Verdict

> We, the jury, find for the plaintiff on his claim for punitive damages and fix same at $50,000.00

It was upon the basis of the jury's answers to the special interrogatories and its subsequent punitive damage verdict that the Court entered judgment on July 17, 1985.

Before turning to the issues raised by the defendant's post-trial motions, it is important to recall that this case was tried to a jury only after a summary judgment in favor of the defendant had been reversed by the Eighth Circuit Court of Appeals. Since the opinion of the Judges on the Eighth Circuit panel has relevance to the defendant's post-trial motions, portions of that opinion are herein quoted at length. After reviewing the procedural history in the lower court, Judge Ross, speaking for the majority of the panel, stated:

> McGee contends that during a four month period in 1979, his business became the target of unlawful and unjustifiable surveillance which interfered with and obstructed his ability and right to earn a living. The surveillance was undertaken by the ABC to crack down on the amount of liquor being illegally imported into the state of Tennessee. . . .
>
> McGee maintains that such surveillance, taken objectively, was conducted in a manner inconsistent with its purported purpose. Furthermore, McGee contends that Hester articulated a motive and intent which

> was inconsistent with and impermissible to the lawful pursuit of his official duties. Put more simply, McGee states that Hester told him that he would "put him out of business." Moreover, McGee contends that Gammon intentionally made his presence known to all customers to discourage them from purchasing liquor from McGee.

After reviewing the standards to be applied in ruling on the motions for summary judgment, Judge Ross went on to say:

> On appeal, McGee argues that the court erred in granting summary judgment because: 1) the appellees could not avail themselves of the good faith immunity doctrine when they exceeded their lawful authority and violated his constitutional rights; and 2) under the facts alleged, the pendent tort claim would lie under Arkansas law. We agree. We feel that the district court improperly granted summary judgment as a genuine issue of material fact exists.

The Court then discussed good faith immunity in the light of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and went on to explain its decision with respect to Mr. McGee's section 1983 claim as follows:

> We feel that the district court erred in focusing solely on the purpose of the surveillance. At some point, the methods of surveillance become so intrustive as to violate the clearly established property right of McGee of which a reasonable person would have known. Thus, the objective test of *Harlow* has been met in this case. On remand, the jury should be instructed to determine whether the appellees engaged in conduct that discouraged customers from

> purchasing liquor at McGee's store and whether the appellees intended such a result to flow from their actions. In short, we feel that the appellees' conduct must be intentional and substantial if McGee is to succeed on the merits. In *Berbiglia v. Cheney*, 249 F.Supp. 258, 266 (W.D.Mo.1965), a case which also dealt with out-of-state surveillance by liquor agents, the court specifically stated that liability could not be found where there was no contact with customers, nor was there any attempt to deter them from making purchases. That situation is quite different than the surveillance methods and motivation alleged by McGee.
>
> The trial court, on remand, should keep in mind that McGee was violating no Tennessee law. The violations alleged were committed by the customers after leaving McGee's place of business.

The dissent filed by Judge Gibson agreed with the lower court's disposition of the matter and also added the following comment:

> I further believe that the court opens too wide a door when it requires that the jury be instructed to determine whether Gammon and Hester engaged in conduct that discouraged customers from purchasing liquor at McGee's store and whether they intended such a result to flow from their actions. The enforcement of Tennessee law could properly have had this result.

The Eighth Circuit opinion was discussed with the attorneys on the record during the course of the trial and particularly on the occasion when the Court was attempting to settle on the instructions. Since it was

ultimately decided by the Court to submit the case on special interrogatories, comprehensive instructions upon the law relating to the section 1983 claim and the pendent state claim were not necessary. Nevertheless, a few instructions were given to lend guidance to the jury in answering the interrogatories. The ones pertinent to our discussion here are set forth as follows:

1. In this action plaintiff asserts two separate causes of action: one, a federal claim under Section 1983 of the Civil Rights Act for deprivation of his property without due process and, second, a a state claim for wrongful interference with plaintiff's business relations. In order to prevail the plaintiff must establish the essential factual bases of such claims by a preponderance of the evidence.

   The defendant in his answer has asserted the affirmative defenses of good faith immunity and privilege of law enforcement officers; he also asserts that plaintiff should not recover because he himself broke the law by agreeing with others to violate the Tennessee law. The defendant has the burden of proof to establish by a preponderance of the evidence the essential factual bases of such defenses.

   * * *

2. The Court instructs you that a law enforcement officer with the Tennessee Alcoholic Beverage Commission has the duty to enforce the laws of the State of Tennessee concerning the illegal importation of non-taxed liquor into Tennessee. The Court further instructs you that agents of the Tennessee ABC have no special authority as law enforcement officers when they come into the

State of Arkansas to conduct surveillance activities; however, they do possess the rights of any other citizen when they come into Arkansas. For instance, they have the right to use public ways and business properties just as any other citizen.

They may discreetly observe, make notes, and follow automobiles just as any other citizen. In particular they would have the right to follow Tennessee vehicles which they have reason to believe contain untaxed liquor back across the state line into Tennessee.

The Court instructs you that the defendant had a duty to arrest persons who he had reason to believe illegally transported non-tax paid liquor into the State of Tennessee.

The Court further instructs you that the defendant was privileged to use the media to publicize his proper law enforcement measures and his intention to enforce the law for the purpose of deterring such violations so long as his statements and representations were true.

3. It is not contended by anyone that the plaintiff, in carrying on the ordinary operations of his retail business, was violating any law whether he was selling to Tennessee residents or to anyone else. The defendant does contend that Mr. McGee would be violating Tennessee law if he encouraged or induced Tennessee residents to violate the Tennessee law.

Many of the issues raised by the Defendant's Motion For Judgment Notwithstanding The Special Verdict Or, In The Alternative, Motion For A New Trial, were raised

and discussed with the attorneys at the conclusion of the plaintiff's case in connection with the defendant's Motion for a Directed Verdict. In addition to the standard motion, which was directed at the liability issue, the defendant contended that there had been no showing of any proximate relationship between any damages sustained by the plaintiff and any improper conduct on the part of the defendant, Mr. Hester. Defendant also contended that plaintiff's damage evidence was entirely speculative. The Court has listened to the tape recording of the complete discussion concerning defendant's motion for a directed verdict.

The Court pointed out during the discussion that there was no evidence that anyone had been arrested by the defendant or his agents while in the state of Arkansas. Nor was there any evidence that any of the arrests that were actually made (that is, of Tennessee residents in the state of Tennessee) were improper or illegal in any respect. The Court noted its view of the law concerning the defendant's duties and authority which eventually ended up as the Court's instruction no. 2 quoted above in this opinion. Accepting the duty of Mr. Hester to enforce the Tennessee law, the matter came down to the question of the methods, tactics and procedures used to accomplish that end. The Court stated that it had considerable difficulty in concluding that there was any impropriety or unreasonableness in the surveillance techniques used by defendant's agents, even when viewed in the light most favorable to the plaintiff. The defendant's agents came in civilian clothes and in unmarked vehicles. They observed and took license numbers and followed certain cars back to Tennessee. One of the agents, Mr. Gammon, was inside the plaintiff's place of business on one occasion. There was no evidence that any of the plaintiff's customers

actually recognized any of the Tennessee Alcoholic Beverage Commission agents on their own. Indeed there was nothing in the appearance of the agents which would suggest their official identity. It was not until the plaintiff went to the defendant's office in Tennessee and had someone actually point out to him the agents involved that he himself was able to recognize them. Two of plaintiff's witnesses admitted that they did not recognize or identify defendant's agents until they were actually pointed out to them as such *by the plaintiff or his employees.* The Court noted the other evidence: that the agents parked their cars outside—first close to the door and then, after plaintiff complained, farther away; that some witness believed the defendant's agents might have used a camera or binoculars, he wasn't sure which and it could have been neither; the use of plain, unmarked cars with aerials which the jury might believe suggested that they were associated with law enforcement and somehow with the state of Tennessee. The Court noted the evidence concerning the media coverage of the plaintiff and of the defendant, pointing out that the evidence made it clear that the "damage" sustained by the plaintiff was not the result of customers being deterred from purchasing at plaintiff's store because of the presence of defendant's agents at that store or their tactics, but rather the effect of the media publicity which obviously deterred Tennessee residents from coming to Arkansas in the first place. In other words it was not the people who came to the plaintiff's place of business, and who, because they were influenced by improper surveillance tactics, did not make purchases that were the source of any significant damage to the plaintiff. Rather, it was the great number of Tennessee potential customers of plaintiff who did not come to Arkansas at all because of the publicity that was the obvious source of plaintiff's damage.

Of course, the most important evidence was the testimony by Mr. McGee that the defendant, Mr. Hester, stated, in effect, that he was going to put him (McGee) out of business. In analyzing the effect of that evidence, the Court concluded that, standing alone, it would not be adequate support for either of plaintiff's causes of action. (See discussion on motion for directed verdict.) So there is no way to avoid focusing upon the facts concerning the surveillance tactics actually employed by defendant's agents. (And, at this point, we are assuming that there is evidence from which the jury could find that the defendant was controlling and directing the details of his agent's surveillance procedures.)

In analyzing the damage question, the Court asked the parties to assume that the defendant made public a statement that he was going to enforce the Tennessee tax laws by utilizing admittedly improper and illegal procedures and spelling them out in the public statement but that he never, in fact, employed any surveillance at all. And the parties were asked to further assume that, as a result, potential Tennessee customers did not come to Arkansas to purchase from plaintiff's business and that plaintiff therefore lost a considerable amount of business and the profits incident thereto. The question was then asked: would the plaintiff's statements alone be actionable under such circumstances? The Court indicated considerable doubt.

Plaintiff's counsel in response pointed out that the Court of Appeals had before it essentially the same information concerning the defendant's surveillance tactics and procedures as that which had been presented to the jury. He argued, therefore, that the Eighth Circuit would permit, indeed require, the issue to be resolved by the jury.

The Court finally concluded that it should not direct a verdict in favor of the defendant despite its doubts with respect both to the liability and damage issues. As a result the defendant went forward with his case.

At the conclusion of the entire case the defendant renewed his motion for a directed verdict. It was denied. However, the Court tentatively concluded that the evidence was not sufficient to permit the submission of the punitive damage claim. It stated, nevertheless, that if all of the pertinent interrogatories were answered favorably to the plaintiff, then it would entertain a motion by the plaintiff to reconsider that ruling. As it turned out those interrogatories were answered favorably to the plaintiff and the Court did reconsider and finally submit the punitive damage claim to the jury.

Now that the entire trial is over, the Court is again confronted with the issues that were raised by the defendant's motion for summary judgment and by the defendant's motions for directed verdict both at the conclusion of the plaintiff's case and at the conclusion of the entire case. The court doubts that there is an adequate evidentiary basis for the jury's answers to interrogatories numbered 3, 5A, 5B and 6.

The evidence with respect to the surveillance tactics, even when viewed in the light most favorable to the plaintiff, simply does not appear to support a finding that those tactics were unreasonably intrusive. The Court is also doubtful that the evidence would sustain any finding that Mr. Hester's agents engaged in conduct that would naturally and foreseeably discourage on-site customers from purchasing liquor at Mr. McGee's store. Of course, the *publicity* resulting from statements made by both the plaintiff and the defendant undoubtedly caused

Tennessee residents to decide not to risk arrest by coming to Arkansas to purchase liquor to bring back to Tennessee. It is important to note that the Eighth Circuit did not take issue with *Berbiglia v. Cheney*, 249 F.Supp. 258 (W.D. Mo. 1965). It distinguished that case by stating that: "that situation is quite different from the surveillance methods and motivations alleged by Mr. McGee."

In the light of *Berbiglia* it is difficult for the Court to understand how the defendant, even if he had investigated the law, would have known or would have been put on notice that any constitutional violations would result from the surveillance procedures employed. This Court knows of no case on the books which would have alerted a law enforcement officer that such surveillance tactics as were actually employed here would violate the constitutional rights of a merchant under circumstances similar to those found in this case. But again, the Eighth Circuit opinion clearly indicates its view that the facts in this case are quite different than in *Berbiglia*. The majority opinion states, "At some point the methods of surveillance become so intrusive as to violate the clearly established property right of McGee *of which a reasonable person would have known.*" (Emphasis supplied). And, the summary judgment submissions detailing the surveillance methods were before that court.

The Court rejects once again the suggestion that defendant's motive or state of mind *alone* might be a sufficient predicate for an award of damages even if defendant's agents' surveillance techniques were not improperly or unacceptably intrusive. Assuming that a law enforcement officer develops a personal animus against (even hatred of) one who he feels is responsible for the particular law enforcement problem he is dealing with, is that officer going to be held liable for damages

if the *actions* he takes to enforce the law are nevertheless within legal limits? Surely the answer must be "no." Otherwise, law enforcement officers will be constantly exposed to civil actions. Or they will have to forego enforcing the law if it might adversely affect the person with respect to whom they have such negative feelings. It is not unusual for law enforcement officers to develop such attitudes toward those who they feel are violating the law or causing others to violate the law. The facts in this case make the point. Here there was no evidence that the defendant personally knew of the plaintiff or plaintiff's place of business at the time he *initiated* the surveillance enforcement program. It was only later, when the defendant complained, that any personal motive or animus could be said to arise. (Of course, there was evidence from which the jury could find that the amount and frequency of the surveillance increased thereafter.) Assuming the defendant developed a personal animus against the plaintiff at that time, must he then stop or not intensify the surveillance program or risk liability to the plaintiff? The answer appears obvious. Therefore, the Court must examine the surveillance tactics and measures, as revealed by the evidence, to determine if the trier of fact could properly find that they were intrusive according to the appropriate legal standards governing such conduct. The Court has done this in its discussion supra.

The Court is concerned about the precedential effect of this case on proper, but unpopular, law enforcement efforts. Nonetheless, although the plaintiff's actual evidence with respect to the surveillance tactics and methods was probably not as strong as that suggested in the response made to the defendant's motion for summary judgment, the Court concludes that the Eighth Circuit had be-

fore it essentially the same factual information developed at the trial and that that court would therefore be satisfied that there was a proper evidentiary basis for the jury's answers to interrogatories 3, 5A, 5B and 6.

The jury found that Mr. McGee actively and intentionally solicited Tennessee customers to buy liquor at his store while knowing that the importation of such liquor into Tennessee by such customers would be a violation of Tennessee law. (See answer to interrogatory 7.) However, the jury also found that Mr. McGee did not offer to indemnify those Tennessee customers who might be arrested or suffer loss as a result of buying alcoholic beverages at his store and transporting same to Tennessee.

The defendant contends that plaintiff's business expectancy was based "on plaintiff's wrongful conduct of soliciting Tennessee residents to violate Tennessee law" and that therefore defendant is entitled to judgment as a matter of law on grounds of public policy which prevents a person from profiting from his own wrongdoing. The Court gave the following instruction relative to this issue:

> 3. It is not contended by anyone that the plaintiff, in carrying on the ordinary operations of his retail business, was violating any law whether he was selling to Tennessee residents or to anyone else.
>
> The defendant does contend that Mr. McGee would be violating Tennessee law if he encouraged or induced Tennessee residents to violate the Tennessee law.

Certain of plaintiff's advertisements were published in the Memphis papers and were directly aimed at Tennessee residents with maps and directions to plaintiff's business spelled out. And it is accepted that plaintiff knew that,

because of the disparity in Arkansas and Tennessee taxes, he could sell profitably at lower prices than Tennessee liquor dealers. There is clearly an evidentiary basis for the jury's answers to both interrogatory 7A and interrogatory 7B.

The Court is of the opinion that the jury's answers to interrogatory 7A is not a sufficient basis for concluding that Mr. McGee should be barred from asserting his claim on public policy grounds. Again, the Eighth Circuit was obviously aware of this "border competition" issue. The majority opinion stated, "The trial court, on remand, should keep in mind that McGee was violating no Tennessee law."

So the Court with great hesitation concludes, in accordance with its understanding of the Eighth Circuit's opinion in this case, that the jury's findings established the defendant's liability under both section 1983 and under Arkansas tort law. A serious problem nevertheless exists with respect to damages.

The jury found that the plaintiff sustained a loss of $7,573 as a direct and proximate result of defendant's actions. (See answer to interrogatory 8.) However, it was then asked if plaintiff's loss was caused by publicity about arrests and surveillance activities or "because purchasers were discouraged by actually seeing and observing the surveillance tactics and procedures?" The jury answered: "Both."

The jury was also asked if plaintiff's damage was ". . . the result of *Tennessee residents* deciding not to come and purchase liquor at plaintiff's place of business . . ." or was ". . . the result of the decision of *Arkansas* and *non-Tennessee* residents not to purchase liquor at plaintiff's place of business together with Tennessee residents who might purchase such liquor with no intention of taking

same to Tennessee." The jury answered: "Both groups." (See interrogatory 8C.) The jury's answers to interrogatories 8B and 8C make it clear that the damage figure fixed in 8A cannot be sustained.

The Court stated its view of the pertinent law in paragraph 3 of Instruction 2 as follows:

> The Court further instructs you that the defendant was privileged to use the media to publicize his proper law enforcement measures and his intention to enforce the law for the purpose of deterring such violations so long as his statements and representations were true.

The Court concludes that there is no lawful basis for holding the defendant liable because publicity concerning his law enforcement efforts deterred Tennessee residents from violating the Tennessee law. Therefore, since the jury has found that such publicity was one of the causes for plaintiff's damage, the damage figure must be modified or set aside. In this connection, the Court notes that the jury fixed the damages at exactly the dollar figure testified to by the plaintiff. And, the jury also concluded that the plaintiff's damage was occasioned not only by Tennessee residents not coming to purchase liquor at his place of business, but also as a result of Arkansas and non-Tennessee residents being deterred by the presence of essentially unidentifiable law enforcement officers on or about plaintiff's place of business. The defendant argues that there is no rational basis for such on-site people being deterred since purchases of liquor by them would be entirely lawful. The Court concludes that the defendant would be correct in this contention if we were dealing only with the mere presence of law enforcement officers. However, if such customers were deterred by the legally obtrusive conduct

of such officers, the argument would have no validity. And, despite doubt, as expressed above, this Court must accept that there is a proper basis for the jury's determination that the surveillance tactics were overt, intrusive and intended to drive off plaintiff's customers.

Even though there is an apportionment problem created by the jury's answer to 8B, still, accepting the Court's conclusions concerning the defendant's liability, the jury's answers to interrogatories 8A, 8B and 8C establish an evidentiary basis for an award of *some* compensatory damages to the plaintiff.

The defendant argues that there is "no evidence that defendant's conduct prevented a single prospective customer from making a purchase at plaintiff's business." The evidence is indeed weak that any purchaser was actually deterred by the surveillance tactics of defendant's agents. But the evidence is such that a jury might draw an inference that "legitimate" (non-Tennessee) customers were probably deterred—if one accepts (as the Court has reluctantly done) that the surveillance tactics were in fact obvious and intrusive.

The Court will direct a remittitur of all but $1,500 of the actual damages found by the jury.

When the case was originally submitted to the jury the Court tentatively concluded that the plaintiff had not made an evidentiary basis for an award of punitive damages. However, it noted at the time that if the jury found for the plaintiff on all of the pertinent interrogatories, then it would reconsider submitting the punitive damage issue.

The jury found that when Mr. McGee telephoned the defendant, Mr. Hester, to complain about the action of Mr. Hester's agents, the defendant told Mr. McGee that

"he was going to put Mr. McGee out of business;" that Mr. Hester, in directing the surveillance program, had a "personal, conscious motive or intention to specifically harm or damage Mr. McGee or his business;" that Mr. Hester purposely and intentionally singled out Mr. McGee and his business for surveillance activities; that Mr. Hester in carrying out the surveillance understood he was violating Mr. McGee's constitutional rights; that Mr. Hester instructed his agents to conduct the surveillance in an intrusive manner for the purpose of frightening away Mr. McGee's legitimate customers and that the surveillance by Mr. Hester's agents were in fact conducted openly and overtly. And, of course, the jury found that defendant's acts inflicted actual damage upon the plaintiff. With these factual findings in hand, the Court felt it appropriate to give the following punitive damage instruction:

> In addition to actual damages the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct and to deter such conduct.
>
> If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual damages; and should further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was maliciously or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in a reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must

> be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

The jury found for the plaintiff upon his claim for punitive damages and fixed same at $50,000.

The Court has already stated its doubts about the factual bases for certain of the jury's findings noted above. But it has nevertheless accepted same. This being so, it must also accept the factual basis for the jury's punitive damage award.

The defendant argues that the special verdict of the jury as to punitive damages "is grossly excessive and unreasonable under the evidence so as to show passion or prejudice against the defendant." There was evidence from which the jury could find ill will on the part of the defendant and draw an inference of malice. But the Court also feels constrained to point out that the closing argument of the defendant, in its content and in the manner of its delivery, appeared to be intended to appeal to any racial prejudice which might exist on the part of the white jurors. This Court allows great breadth in closing arguments and it cannot say defendant's counsel intended to appeal to racial bias but such clearly was the appearance. The Court was tempted several times to intervene even though plaintiff's counsel (probably wisely) did not object. But it did not do so.

The plaintiff, Mr. McGee, is apparently a highly respected and very successful black entrepeneur. He has served on the Board of Trustees for the Arkansas State University at Jonesboro. It appears to the Court that

the jurors might well have resented the argument and its apparent but veiled appeal to racial prejudice. It is, of course, not proper for the defendant to contend that his own argument to the jury may have "backfired" and inflamed the passions of the jury against him, resulting in the punitive damage award. More importantly, the evidence, which has been accepted by the Court as adequate to support the jury's findings, is also sufficient to permit an award of punitive damages. The defendant argues that he was denied any reasonable opportunity to present evidence as to his financial condition and ability to pay punitive damages. The Court is not certain of the record in this respect. If, as the Court believes, it did not initially determine to withhold the punitive damage issue until after both parties had rested their case, then there is obviously no merit in this contention. However, if it indicated its attitude before the defendant rested, then the defendant may have a point. However, the jury in any event was aware of the occupation of the defendant and could draw inferences as to his salary as such a law enforcement officer. They also knew he was a retired agent of the FBI. And the Court cannot say with any confidence that the size of the award here, although high, would not be sustainable regardless of the direness of the defendant's personal financial picture.

The Court is thoroughly ambivalent about this case. It nevertheless concludes that, on the basis of the analysis of the Eighth Circuit, it must uphold the jury's verdicts both with respect to actual and punitive damages. The clear message is: Let the jury decide this case. The Court's remittitur of actual damages is not contrary to the jury's verdict. Rather, the remittitur must be made to give effect to the jury's answer to interrogatory 7B.

If the plaintiff accepts the remittitur of actual damages to $1,500, then defendant's post-trial motions will be denied. If the plaintiff refuses to accept the remittitur, then there will be a new trial limited solely to the issues of actual *and* punitive damages.

Plaintiff will make his decision known to the Court by filing an appropriate acceptance or rejection of the actual damage remittitur on or before the 17th day of January, 1986.

The plaintiff, having prevailed on his section 1983 claim, is also entitled to a reasonable attorney's fee. The Court requests the parties to discuss this issue and attempt to reach agreement thereon. Failing that, the plaintiff will submit his formal fee request, itemized and documented. This should be done not later than January 21, 1986. Defendant will then be given until January 31, 1986, within which to respond.

SO ORDERED.

Dated this 8th day of January, 1986.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX D

(Filed September 28, 1982)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

No. J-C-79-145

BEN McGEE, d/b/a THE LIQUOR CENTER
PLAINTIFF

v.

C. A. JONES, SUSAN F. SIMONS, S. W. FRY, Commissioners of the Tennessee Alcoholic Beverage Commission; ELYON DAVIS, Director of the Tennessee Alcoholic Beverage Commission; JOE HESTER, Agent-in-Charge, Western District of Tennessee; ED GAMMON and THOMAS WRIGHT, Agents for the Tennessee Alcoholic Beverage Commission
DEFENDANTS

MEMORANDUM AND ORDER

Pending before the Court are the motions of the defendants for summary judgment. For the reasons expressed in this memorandum, those motions are granted.

Plaintiff filed his original complaint in the Chancery Court of Crittenden County, Arkansas. The complaint alleged that plaintiff's liquor store in West Memphis, Arkansas, was the subject of illegal surveillance by defendants, officers and agents of the Tennessee Alcoholic Beverage Control Commission (ABCC). Plaintiff asked

the court to temporarily restrain the defendants from interfering with the plaintiff's business. That court granted the temporary restraining order on October 10, 1979. One day before a hearing was to be held to determine whether a permanent injunction should issue, the defendants removed the case to this Court. On November 6, 1979, the defendants filed a motion to dismiss alleging that there were insufficient grounds for the issuance of an injunction. Subsequently the plaintiff amended his complaint to seek damages for: (1) violation of his civil rights pursuant to 42 U.S.C. § 1983; (2) conspiracy to violate his civil rights pursuant to 42 U.S.C. § 1985; and (3) a pendent state tort claim alleging malicious and intentional interference with plaintiff's business. The plaintiff asks for $100,000 for his section 1983 claim, $100,000 for his section 1985 claim, $23,500 for the pendent tort claim,[1] and also for permanent injunctive relief.

The complaint sets forth the following facts: From July 2 to October 10, 1979, defendants Gammon and Wright,[2] agents of the Tennessee ABCC, "pursuant to orders of or with the full knowledge and acquiescence of Commissioner Jones, Commissioner Fry and Director Davis," came to the plaintiff's place of business two or three times a week and conducted surveillance "with the purpose and intention to deprive the Plaintiff of his property and money by intentionally interfering and obstructing his civil right to earn a living." The amended com-

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1. The plaintiff has filed a motion to amend his complaint to claim punitive damages against defendants Hester, Gammon, and Davis, and to decrease the amount claimed as compensatory damages to $9,000 as to the pendent state claim. Because of the resolution of the motions for summary judgment, it is not necessary to decide that motion.

2. The defendant Wright was dismissed upon the plaintiff's motion.

plaint characterized the defendants' conduct as "intentional and malicious" and "without justification."

The surveillance complained of consisted of the following: (1) parking approximately five to ten feet from plaintiff's front door; (2) taking pictures of plaintiff's customers; (3) writing down customers' license plate numbers; (4) following customers leaving plaintiff's liquor store; (5) parking close to plaintiff's business when no parking places were available; and (6) coming into plaintiff's business and following customers out as they left.[3]

The amended complaint also alleges that in a telephone conversation initiated by the plaintiff, defendant Hester stated that "he was going to put the Plaintiff out of business" and that "he [Hester] would think of some way to 'get' the Plaintiff." Mr. Hester allegedly stated in a Memphis television interview on October 10, 1979, that the purpose of the surveillance by the Tennessee ABCC was to cut into plaintiff's business.

Prior to the surveillance activities, the plaintiff contends that "all of the Defendants entered into a conspiracy to interfere with the civil rights of the Plaintiff and to deprive him of same, the Defendants entered into a conspiracy and mapped out a policy to be pursued and followed by agents of the Tennessee A.B.C.C." The surveillance activities, according to the plaintiff, "cause customers of the Plaintiff to quit doing business with the Plaintiff."

After the complaint was amended, defendants reasserted their motion to dismiss, contending that the plain-

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3. This sixth allegation was in the original complaint but was not specifically set forth in the amended complaint. The plaintiff discussed this particular allegation in his deposition testimony, noted *infra*.

tiff's allegations failed to state a cause of action upon which relief can be granted. Fed. R. Civ. P. 12 (b) (6).

The motion to dismiss the section 1983 claim was denied. This Court held that the complaint stated a claim for relief for a violation of the plaintiff's civil right to earn a living while noting that, "[i]t may well be true that the legitimate and lawful exercise of law enforcement duties would not, as a matter of law, constitute an unconstitutional deprivation of property. Here, however, the plaintiff alleges that the surveillance was not legitimate or lawful, but rather was malicious, without justification, and done for the sole purpose of driving plaintiff out of business." Given the judicial preference for a liberal construction of pleadings on a motion to dismiss, the complaint was not fatally defective.

As to the defendants Jones, Fry, Simons, and Davis, the Court rejected the contention that the complaint should be dismissed because it was based on a theory of *respondeat superior*. The complaint specifically asserted that those defendants played an "affirmative part" in depriving the plaintiff of his constitutional rights.

The Court also rejected the defendants' contention that the section 1983 claim should be dismissed because they were entitled to qualified good faith immunity as public officials. The Court concluded that the plaintiff's allegations that the surveillance was conducted out of malice and without justification would, if true, defeat the defense of good faith immunity.

The motion to dismiss the section 1985 claim was granted because there was no contention of racial or some other class based discrimination.

The motion to dismiss the pendent state tort claim was denied. The Court concluded that the plaintiff's allegations of a malicious and intentional interference with his business relationships stated a claim for relief under the standards outlined in *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969).

After the Court's ruling on the motion to dismiss, discovery proceeded with an anticipated trial setting of August 16, 1982. Due to a discovery controversy and the pendency of the motions for summary judgment, the Court granted a motion for continuance of that trial setting.

Defendants Simons, Jones, and Fry

These defendants were, at the time the alleged surveillance took place, Commissioners of the ABCC. Defendant Susan Simons has submitted a declaration[4] in support of her motion for summary judgment. In that declaration, she states that her duties as an ABCC commissioner consisted of attending monthly meetings for "the transaction of official business." Such business consisted mostly of licensing matters and sanctions to be taken against certain licensees. "Surveillance activities were never a subject of discussion at such meetings." She states that she did not order, direct, or advise the surveillance of plaintiff's liquor store and had no knowledge of such activity. She further states that the ABCC's law enforcement actions were left to the discretion of the "full-time employees—the director, chief law enforce-

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4. The declaration was given under penalty of perjury and thus comports with the provisions of 28 U.S.C. § 1741 authorizing the use of unsworn declarations in place of sworn declarations or affidavits.

ment officer, and their subordinates." She further indicated that she did not authorize or acquiesce in any statements made by defendant Joe Hester. The defendants C. A. Jones and S. W. Fry have adopted Ms. Simons' declaration as an accurate description of their duties and of their knowledge and involvement in the surveillance of plaintiff's business. The defendants' answers to interrogatories, submitted along with the motion for summary judgment, support the above interpretation of their responsibilities and involvement in this case.

The plaintiff contends that these defendants played an affirmative part in the surveillance of the plaintiff's business because of their key positions in the enforcement and formulation of ABCC policy. Specifically, the plaintiff notes the statement of Mr. Jones in his deposition that it has always been the policy of the ABCC to carry on out-of-state surveillance "from time to time." (Jones dep. at 22). According to Mr. Jones, the matter of out-of-state surveillance was discussed with Elyon Davis when he became director of the ABCC. The fact that enforcement of Tennessee law could entail out-of-state surveillance was understood. (Jones dep. at 3).

In addition, the plaintiff refers to the deposition of Pat DePaolo, the Chief of Enforcement of the Tennessee ABCC. He stated that when he interviewed for the job in August 1979, he was told by the three commissioners that out-of-state importation of liquor was a priority item and that there had been an ongoing effort by the ABCC to conduct surveillance in other states. (DePaolo dep. at 26).

The plaintiff no longer asserts his section 1983 claim against these three defendants. A motion to dismiss the section 1983 claim was filed by the plaintiff, and on

August 30, 1982, this Court entered an order dismissing those claims.[5]

Remaining is the tort claim for interference with business relations, based on the law of Arkansas. Initially, the Court must address the issue of jurisdiction, although the defendants have not asserted it. The plaintiff's amended complaint bases the jurisdiction of the state claim on this Court's pendent jurisdiction. The threshold question is therefore whether there is still federal jurisdiction after the federal question claim has been dismissed prior to trial. In *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966), the Court stated flatly that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Subsequent cases have suggested, however, that the dismissal of pendent state claims after the dismissal of federal claims prior to trial is within the discretion of the district court. *Rosado v. Wyman,* 397 U.S. 397 (1970); *Springfield Television, Inc. v. City of Springfield,* 462 F.2d 21, 23-4 (8th Cir. 1972).

Because of the nature of this case, the Court deems it advisable to retain jurisdiction of the state claims. First of all, although it is not pled in the amended complaint, it is possible, indeed probable, that there is an independent basis for federal jurisdiction, in that the

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5. The defendant Simons has filed a motion to alter or amend that order of dismissal. The Court stated in its order that the defendants had no objection to the motion when, in fact, Ms. Simons was on record as objecting to the dismissal unless it was entered with prejudice. Because the Court grants the defendant's motion for summary judgment, the dismissal of plaintiff's claims will be with prejudice. The Court will note in the order that the dismissal of Simons' section 1983 claim should likewise be with prejudice.

defendants appear to be citizens of Tennessee while the plaintiff is a citizen of Arkansas. Secondly, substantial time and discovery has been expended on this case since it was removed to federal court in 1979. From the date of removal until August 30, 1983, the federal claims were at all times pending. To require the plaintiff to litigate his claim in a state court unfamiliar with the facts and procedural history of this case would not be a wise exercise of judicial discretion and would ignore judicial economy.

The tort of wrongful interference with contractual or business relations is discussed at length in *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969). The court quoted with approval from *Calbom v. Knudtzon*, 65 Wash. 2d 157, 396 P.2d 148 (1964), the following elements of the tort: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. 247 Ark. at 527. In addition to the above four elements, the court strongly suggested that malice, or the absence of legal or social justification, was a necessary element.

> It has now come to be the view of a majority of courts in this country that one who maliciously or without justifiable cause induces a person to breach his contract with another may be held responsible to the latter for the damages resulting from such breach. The term 'maliciously' in this connection alludes to malice in its technical legal sense, that is, the intentional doing of a harmful act without justification or

> excuse, and does not necessarily include actual malice, that is, malice in the sense of spite or ill will.

Id. at 526, quoting *Downey v. United Weatherproofing, Inc.*, 363 Mo. 852, 253 S.W.2d 976 (1953).

The court also explicitly noted that "[e]ven though one may not be liable as a direct actor in interfering with existing contracts of employment, he may incur liability as a participant in a conspiracy which results in one or more overt acts by other constituting actionable interference." *Id.* at 529. This statement was made in the context of civil conspiracy; a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful, oppressive or immoral means.

The requisite elements for this tort were further defined in *Walt Bennett Ford, Inc. v. Pulaski County Special School District*, 274 Ark. 208, 624 S.W.2d 426, *reh. denied*, 274 Ark. 214-a, 624 S.W.2d 429 (1981) ("*Bennett*"). In *Bennett* the unsuccessful bidder on a contract for school buses brought suit against the successful bidder, the individual members of the school board, and the purchasing officers of the school district for tortious interference with business relations. The Arkansas Supreme Court originally held that the school board members and the purchasing officers of the school district could not be held individually liable, absent a showing that they acted in bad faith. In the supplemental opinion denying the motion for rehearing, the court further clarified the requirement of bad faith:

> The general rule is that an improper motive or bad faith is no longer an essential part of the plaintiff's case in the tort of interference with existing contractual relations. However, the defendant may show that his interference was privileged. *Stebbins & Roberts, Inc. v. Halsey*, 265 Ark. 903, 582 S.W.2d 266

> (1979). The case at bar deals with interference with a business expectation and not an existing contract. The chief difference lies in the recognition of more extensive privileges in the case of business expectations. Prosser, Torts, § 130 (4th ed. 1971). In either case, "an impersonal or disinterested motive of a laudable character may protect the defendant in his interference. This is true particularly where he seeks to protect a third person toward whom he stands in a relation of responsibility." Prosser, supra, p.943. In this case, school directors without bad faith were trying to protect the school district . . . This privilege to interfere, without bad faith, was clearly set out in *Middlesex Concrete Products and Excavating Corp. v. Carteret Industrial Ass'n*, 37 N.J. 507, 181 A.2d 774 (1962), as follows: "Protection of the public interest has been recognized by the text writers as affording privilege to acts of interference."

Id., 274 Ark. at 214-a-b.

On the basis of the above stated principles, the Court holds that the facts, viewed in the light most favorable to the plaintiff, warrant summary judgment in favor of the defendants Simons, Jones, and Fry. It is clear that these defendants were privileged in their official capacities as commissioners of the ABCC. It is clear to the Court that enforcing the policy of out-of-state surveillance in order to stop the importation of untaxed liquor was done to protect the interests of the citizens and taxpayers of Tennessee. In this respect, the language of *Bennett* is precisely on point. The defendants stood in a position of responsibility to third persons, and their "disinterested motive" of a "laudable character" protects them in their legitimate establishment of law enforcement policy.

It is also questionable whether the evidence is adequate to establish that one of the requirements of *Mason* is met; to wit, that the interferer had knowledge of the business expectancy. There is no evidence whatsoever that these defendants knew of the plaintiff's business establishment. The plaintiff argues that such knowledge should be imputed by the defendants' participation in the "civil conspiracy." First of all, plaintiff's submissions are inadequate to support a conspiracy theory. And, even if it can be said that the surveillance was unlawful, there is no evidence that *these* defendants *agreed* to, or knew of, such unlawful means. There is certainly no indication that the object of the alleged conspiracy was unlawful.

In any event, the plaintiff has not come forward with any evidence to suggest that the defendants' policy directives to enforce Tennessee laws were not issued for the purpose of enforcing the laws of Tennessee and furthering the interests of citizens of that state.

Defendant Davis

Elyon Davis is the director of the ABCC. He has submitted an affidavit in support of his motion for summary judgment. He states that he became aware of the problem of Arkansas liquor being imported into Tennessee in June 1979. In response to this problem, he informed the agent-in-charge of Memphis, defendant Joe Hester, that ABCC agents should attempt to apprehend and arrest persons illegally importing liquor into Tennessee. Davis was not aware that surveillance was actually being conducted in Arkansas until after the first arrest was made on August 14, 1979. He states that his instructions to Mr. Hester were that any out-of-state surveillance should be conducted in such a way as to be inconspicuous and discreet. He indicated that he gave no instructions to enter the liquor store, to harass customers, or to take photographs. He

gave no specific instructions to conduct surveillance of the plaintiff's store. All enforcement actions were to be directed at Tennessee residents suspected of violating Tennessee law. He states that he never had any intention to harm the plaintiff. There was no plan or specific assignment of agents. As to the surveillance of December 20, 1979, it was not aimed specifically at the plaintiff's business, and his decision to conduct a general investigation was made only after individual consultation with the assistant attorney general of Tennessee.

The court has also examined the deposition of Mr. Davis for a more thorough discussion of the details of his involvement. Mr. Davis stated that it was an ongoing policy of the ABCC to stop the importation of untaxed out-of-state liquor. He became aware of the problem in the Memphis area in "many ways." First, he noted that Memphis liquor store owners complained about the loss in their business due to West Memphis liquor dealers. Second, Mr. Davis states that he received complaints from Tennessee residents regarding the illegality of untaxed liquor being imported into Tennessee.

As a result of these complaints, Mr. Davis stated that he informed the agent-in-charge, Mr. Hester, that some action should be taken to crack down on the out-of-state liquor traffic. He states that he gave no specific directions to Mr. Hester as to how this was to be accomplished. He indicated that he had confidence in Mr. Hester and felt that his experience as an F.B.I. agent and his specific knowledge of the Memphis area would enable him to handle the problem. At the direction and authorization of Mr. Davis, agents were sent to Memphis, along with Mr. Pat DePaolo, the Chief of Enforcement, to aid in the "crackdown" of December 20, 1979. He

noted that the enforcement was aimed not only at importation from Arkansas, but that Mississippi was also a prime target of the planned enforcement. At no time was it contemplated that Mr. McGee would be an actual target of the investigations.

Mr. Davis has indicated that he first knew about the plaintiff's store being the subject of the surveillance after this lawsuit was filed. After the temporary restraining order was entered by the Crittenden County Chancery Court, Mr. Davis states that he instructed Mr. DePaolo to be sure that the agents did not violate the express provisions of the order.

The defendant has moved for summary judgment arguing that he is immune from liability under section 1983 because his actions were taken in good faith. *Wood v. Strickland*, 420 U.S. 308 (1975). He also argues that the state tort claim should be dismissed in the Court's discretion and that, in any event, his good faith motivations preclude a finding of liability on this claim.

The plaintiff argues that summary judgment is improper on the section 1983 claim because genuine fact issues remain to be litigated. First of all, he notes that there is evidence that Mr. Davis had prior knowledge of the surveillance of plaintiff's store. The plaintiff testified at his deposition that he telephoned the offices of the Tennessee ABCC in the fall of 1979 to complain about the surveillance, and asked for Mr. Davis. A man answered the phone, and Mr. McGee assumed that it was Mr. Davis. (McGee dep. at 140). The defendant denies having any telephone conversation with Mr. McGee. The Court does not consider this issue of fact to be material. It is the conclusion of the Court that the defendant is immune from liability under section 1983 because his

actions were taken in good faith. As will be discussed below, Mr. Davis did not know, nor should he have known, that his authorization of enforcement actions against the importation of untaxed liquor would or might violate the constitutional rights of Mr. McGee. Even if he knew prior to December 1979 that Mr. McGee was complaining about the surveillance, he had no reason to believe that such activity was in violation of the plaintiff's rights.

The good faith immunity of public officials from liability under section 1983 has recently been clarified in *Harlow v. Fitzgerald,* 50 U.S.L.W. 4815 (June 24, 1982). The Court noted that an official's good faith defense has both an objective and subjective aspect. The subjective component refers to the defendant's impermissible motivations; i.e., whether the defendant's actions were motivated by malice. The objective element refers to whether the defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." *Id.* at 4819, quoting *Wood v. Strickland,* 420 U.S. 308, 320 (1975). The Court discussed the resolution of both aspects of the good faith defense on a motion for summary judgment. Because of the difficulty of ever determining the actual motivation of a particular act without the decision of a jury, the Court concluded that the federal district courts should analyze the objective standard in deciding whether a public official's actions were taken in good faith.

> [T]he judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experience, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judg-

> ment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government . . . . We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 4820 (citations and footnotes omitted).

Based on the above principles, this Court must determine whether Mr. Davis should have known that his decisions and authorizations in 1979 (to carry out the long standing policy of the ABCC to enforce the Tennessee liquor laws against importation of untaxed liquor) would violate the clearly established constitutional rights of Mr.

Ben McGee. A review of the applicable law and the facts which are before the Court lead but to one conclusion: Mr. Davis could *not* have known that his authorizations and directions, made in the course of his official duties, would or might violate the constitutional rights of the plaintiff.

This conclusion is supported by the facts before the Court by way of affidavit and depositions. It is clear that Mr. Davis did not, in fact, know that Mr. McGee would be a target of the surveillances. It is obviously difficult to conclude that the defendant knew that the plaintiff's rights would be violated, if he did not in fact know that the plaintiff would be the subject of the surveillance.

The plaintiff could nevertheless argue that authorizing surveillance would lead one to the conclusion that *someone's* rights would be violated, and that there is no requirement that the defendant know before the fact the identity of the specific individual who would be harmed. It is clear to the Court, however, that Mr. Davis did not know that his directions to enforce the Tennessee liquor laws would violate *anyone's* constitutional rights.

The plaintiff made clear in his response to the motion to dismiss that the constitutional basis for his section 1983 claim was an asserted deprivation of his property without due process of law. The amended complaint claims a "deprivation of rights, privileges and immunities secured to [plaintiff] under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States." In his response to the motion to dismiss, the plaintiff translated this to mean that he "is seeking vindication of his property rights."

As noted in the Court's memorandum denying the motion to dismiss, a deprivation of property without due process is a cognizable claim under section 1983. The fact that the complaint states a claim for relief sufficient to survive a motion to dismiss, however, has nothing to do with whether the law was sufficiently settled enough, at the time of the acts complained of, that the defendant should have known that plaintiff's rights would be violated. The plaintiff has not directed the Court's attention to a single case which is factually on point. The plaintiff has not cited a case which holds that out-of-state surveillance of the customers of a particular business, for the purpose of enforcing in-state revenue laws, violates any constitutional mandate.

Only one case has dealt with the right of alcoholic beverage control agents of one state to enter another state for the purpose of observing and eventually arresting citizens for violation of liquor laws. In *Berbiglia, Inc. v. Cheney,* 249 F.Supp. 258 (W.D. Mo. 1965), Kansas ABC agents conducted surveillance of Kansas residents purchasing liquor in Missouri. The agents then followed the purchasers back into Kansas, at which point they were arrested for violating the Kansas liquor law requiring the payment of state taxes on alcoholic beverages, and for possessing alcoholic beverages without the required revenue stamp. The plaintiff, a Missouri retail liquor dealer, filed suit in state court alleging that the actions of the ABC violated his rights to property, were a nuisance under Missouri law, and that the Kansas liquor laws were themselves unconstitutional. The defendant, the director of the Kansas Alcoholic Beverage Control, removed the case to federal court.

The court rejected all of the plaintiff's contentions. The court noted that "[o]bserving plaintiff's customers

without any contact with such customers, or any communication with them or any effort to deter them at the time from making purchases, is not a violation of the law, and following such customers back to the state line likewise is not a violation of the law."[6] *Id.* at 266.

So, at the time of the acts complained of, the only reported case dealing with the legality of out-of-state liquor surveillance had ruled in favor of legality. On that basis alone, the Court could conclude that Mr. Davis did not know, nor should he have known, of possible constitutional transgressions which might result from his directives. In addition, Mr. Davis' knowledge of the state of the law at that time would no doubt have been shaped by the constitutional framework for state regulation of intoxicating liquor.

The Twenty-first Amendment to the Constitution provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." This provision has been interpreted as vesting the states with wide discretion in the implementation and enforcement of laws relating to the importation of liquor into their respective states. *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966).

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6. The court did not specifically address the constitutional issue that is before this Court. The quoted ruling was based on an analysis of the substantive law of Missouri. While not controlling on the issue of whether the surveillance violated Mr. McGee's constitutional property rights, *Berbiglia* would certainly help form the basis of the state of the law concerning out-of-state liquor surveillance when Mr. Davis made his decisions in 1979. In denying the motion to dismiss, this Court noted that *Berbiglia* did not control whether the plaintiff's complaint stated a claim for relief on the pendent state tort claim. It is, however, clearly relevant as to what Mr. Davis could reasonably have been expected to know about the law at the time surveillance was tacitly authorized.

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

California v. LaRue, 409 U.S. 109, 114 (1972).

It is true that the Twenty-first Amendment has not been specifically interpreted to constitutionally sanction out-of-state surveillance against an asserted Fourteenth Amendment property claim. It is also true that the discretion given the states by the Twenty-first Amendment does not necessarily supersede other constitutional provisions. *See, e.g., Craig v. Boren,* 429 U.S. 190 (1976) (the equal protection clause of the Fourteenth Amendment); and *Department of Revenue v. James Beam Co.,* 377 U.S. 341 (1964) (the Export-Import Clause). It is clear to this Court, however, that the authority given the states to control the importation of liquor necessarily implies the justi fication for the use of reasonable means for enforcing such control. "In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980).

In the context of this particular fact situation, the Court concludes that the actions of the Tennessee ABCC were reasonable means to enforce their constitutional prerogative to control the importation of untaxed liquor. If, indeed, Tennessee were to enforce its law against such importation, and if it were to bring criminal prosecutions against violators, observing the purchase of liquor out of state was the most reasonable alternative for effecting such enforcement. While other alternatives may have existed (stopping all cars entering Tennessee, making random checks of cars entering Tennessee, or utilizing an undercover informant placed in out-of-state liquor establishments), the Tennessee ABCC should not be precluded from using the most obvious, reasonable and direct method.

In any event, the question is not whether out-of-state liquor store surveillance is constitutionally permissible. The question is whether the state of the law in 1979 would lead a reasonable person to conclude that directing the enforcement of state liquor laws (which might require out-of-state surveillance) would violate clearly established constitutional rights. Based on the Court's discussion of the law, it is convinced that Mr. Davis not only did not know but should not have known of any possible violation of Mr. McGee's constitutional rights.

The Court now directs its attention to the pendent state tort claim. For the reasons previously expressed, the Court will retain jurisdiction of this claim and decide it on its merits. The reasoning used by the Court to grant summary judgment for defendants Jones, Fry, and Simons is equally applicable to defendant Davis. On the basis of the facts before the Court by way of affidavit and deposition, there is no doubt that Mr. Davis was privileged to act as he did, as his motivation was to enforce the laws of Tennessee in the public interest and not to maliciously

interfere with the business of Mr. McGee. The record documents that there is no submissible jury issue on this point.

The plaintiff argues that the purpose of the surveillance was to protect Memphis liquor dealers, and not to safeguard the taxpayers of Tennessee. The plaintiff therefore argues that the defendant was not privileged because he was not acting out of a "disinterested motive of a laudable character." The Court does not find this reasoning persuasive. First of all, the plaintiff offers no evidence that the purpose of the surveillance was other than the enforcement of the law. All that is established is that the complaints of Memphis liquor dealers triggered the knowledge of the ABCC officials that on-going violations of the law were occurring. Secondly, the argument that public officials are protecting special interests is always present in any governmental action. The enforcement of some laws will always benefit certain interests or segments of the community. It is only natural that those interests complain when the law is violated and seek enforcement. Third, even if the surveillance was done solely to protect the liquor industry of Tennessee, the Court is convinced that such motivation is not suspect. The Tennessee liquor dealers are citizens of that state, who pay taxes on liquor sold in that state, and who are protected in their businesses by state laws which prohibit the importation of untaxed liquor. To enforce the liquor laws for their protection is not an impermissible motivation that would deny the defendants the privilege of limited interference in plaintiff's business.

No genuine issue of material fact remains to be litigated with respect to either the section 1983 claim or the tort claim based on Arkansas law. Defendant Davis' motion for summary judgment will therefore be granted.

Defendant Hester

Joe Hester was the agent-in-charge of the Memphis area at the time of the surveillance in 1979. He is no longer an agent with the ABCC. The Court has examined Mr. Hester's deposition for his statement regarding the surveillance of plaintiff's business.[7]

Mr. Hester stated that he "regularly" received complaints from Memphis liquor store owners about the situation in West Memphis. He indicated that the gist of the complaints was "[t]hat they wanted the law enforced." (Hester dep. at 5). Pursuant to those complaints and the directions of Elyon Davis, he directed agents Gammon and Wright to go to West Memphis to conduct surveillance of Tennessee residents purchasing liquor, and effect their arrest in Tennessee. He gave no specific instructions regarding the surveillance, but left the mechanics of it up to Mr. Gammon. The only thing he told the two agents was "to be successful at it, and to be unobserved." (Hester dep. at 7).

The object of the surveillance, according to Mr. Hester, was to arrest Tennessee citizens violating Tennessee law. "It was never an object to run anybody out of business. But more arrests were made, I presume, I really don't know who sells the most. I would guess that perhaps Walgreen's, sells more whiskey than does the Liquor

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7. The plaintiff notes that there is no affidavit accompanying Mr. Hester's motion for summary judgment, and that the motion is therefore not ready for disposition. The defendant's deposition, given under oath, may be used in place of a sworn affidavit in a motion for summary judgment. Rule 56(c) provides that "[t]he judgment shall be rendered forthwith if the pleadings, *depositions*, answers to interrogatories, and admissions on file, together with the affidavits, *if any*, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis supplied).

Center (Mr. McGee's business). But, we made more arrests of people coming from Walgreen's than we ever did of people coming from McGee's." (Hester dep. at 39). This was a continuation of a long-standing policy.

Mr. Hester stated that he is a former F.B.I. agent, and was aware of the need for making lawful searches so that the evidence would be admissible in court. He also indicated that he was cautious in his law enforcement activities because of the proliferation of lawsuits against public officials.

The Court has concluded that there is no genuine issue of material fact with respect to the section 1983 claims. As was discussed in Mr. Davis' motion for summary judgment, Mr. Hester could not and should not have known when he ordered the agents to observe Tennessee residents in Arkansas that the plaintiff's constitutional rights would be violated.

The tort claim for wrongful interference with business relations presents a closer question. The central inquiry is whether the defendants' acts were privileged, as defined by the standard in *Bennett, supra*. The plaintiff has asserted that he telephoned Mr. Hester on July 17, 1979, who told him that "he was going to put the plaintiff out of business" and that "he [Hester] would think of some way to 'get' the Plaintiff." (Amended complaint, ¶ 5).

Mr. McGee stated in his deposition that when he first called Mr. Hester, Hester inquired whether he was from Tennessee. McGee claimed that Hester said he would throw him in jail if he were from Tennessee. He indicated that Mr. Hester became very angry after he [McGee] referred to the F.B.I.'s mishandling of the Martin Luther King assassination. Mr. McGee apparently be-

lieved that Mr. Hester was the F.B.I. agent in charge of the investigation of the King slaying (McGee dep. at 79). Mr. Hester allegedly told Mr. McGee that he had no business selling liquor to Tennessee residents.

At some point prior to December 1979, Mr. McGee made another phone call to Hester to complain about the continuing surveillance. He relates the conversation as follows:

> [J]ust as soon as he got on the phone he jumped all over [illegible] and started telling me about—he said, "I'm going to put you out of business," and he went on to tell me all this stuff and I said, "You're just hanging around my place. Why don't you go hang around someplace else?" He said, "Oh, we'll check other places." I said, "I'll bet you won't go to Mississippi. I've never seen an arrest in Mississippi that you've made in the papers." He said, "Give me time. I'll get somebody in Mississippi." And two or three days later he did. He showed me he could get somebody.

(McGee dep. at 81). When asked why he thought Mr. Hester would want to put him out of business, Mr. McGee responded: "Well, my feelings at that time, Mr. Hester came on real strong. He'd start off at a low tempo and really got excited. If you want to know what my thoughts were, I thought he was crazy . . . . I haven't changed my opinion one bit of Mr. Hester." (McGee dep. at 153).

Mr. Hester's version of those conversations is substantially different. With respect to the first conversations is substantially different. With respect to the first conversation, the defendant states that he does not recall the reference to the Martin Luther King investigation

(he states that he was not involved in that investigation), and that he did not get angry with Mr. McGee. With respect to the second conversation, he denies making any threatening remarks about putting the plaintiff out of business, and denies any reference to arrests in Mississippi. (Hester dep. at 41-3). So there are factual issues on such points.

The plaintiff also alleges that Mr. Hester evidenced his malicious intentions by statements made in a television interview on October 10, 1979, the day the temporary restraining order was entered. According to the plaintiff's interpretation of this interview, Mr. Hester announced his intentions to run the plaintiff out of business.

A transcript of that interview was read to Mr. Hester at the taking of his deposition. The quoted portion was as follows:

> Mr. Hester: "We do not harass their customers. However, I hope, sincerely hope, that we're cutting down on their business, because that's the purpose for what we're doing. The State of Tennessee loses an enormous amount of revenue from people going to Arkansas and Mississippi and buying liquor and bringing it back into Tennessee. This is clearly a violation of the law. We are very much hoping to stop that sort of thing."

(Hester dep. at 35). The plaintiff has provided the Court with a videotape of that interview. The above quoted transcript was a verbatim quotation from the interview. At his deposition, Mr. Hester interpreted this remark to mean that "If I can stop whiskey from coming into Tennessee without the tax being paid, then obviously, it's bound to show up in somebody's gross revenue."

He stated that he had absolutely no intent to harm Mr. McGee. (Hester dep. at 37).

In analyzing a motion for summary judgment, the Court must interpret the facts in the light most favorable to the party against whom summary judgment is sought. If any genuine issue of material fact remains to be litigated, the motion for summary judgment should be denied. Here it is clear that a genuine issue of fact remains with respect to the telephone conversations. Mr. Hester and Mr. McGee obviously differ about the content of those conversations. The Court is convinced, however, that that particular issue of fact is not a *material* one; even if the conversation took place as the plaintiff alleges, the defendant would still be entitled to judgment as a matter of law.

The directions of Mr. Hester to agents Gammon and Wright to initiate the surveillance activities must be placed in proper perspective. There is no dispute in this lawsuit that the practice of out-of-state surveillance was part of a long and continuing policy of the Tennessee ABCC to enforce the prohibition against non-taxed liquor. The plaintiff has repeatedly emphasized that fact in urging the denial of the instant motions for summary judgment. Indeed, that is the basis for urging liability on behalf of the defendants Simons, Fry, Jones, and Davis. There is no dispute that Mr. Davis directed Mr. Hester to step up enforcement of the law in the Memphis area. There is also no dispute, indeed plaintiff relies to a large extent on this fact, that the defendants were reacting to complaints from Tennessee liquor dealers. The plaintiff has not come forward with any evidence that Mr. Hester knew personally of the plaintiff's business at the time the decision to step up law enforcement began.

Against this background of undisputed fact, the plaintiff maintains that the defendant's threatening statements indicate that the surveillance was undertaken for improper purposes and was designed to maliciously deprive the plaintiff of his right to earn a living. The Court cannot accept this inconsistent position. Assuming that the threatening statements were made, and Mr. Huester became angry, as Mr. McGee maintains, there is absolutely no evidence that such indiscreet remarks evidence the true purpose behind the surveillance which was undertaken before Mr. Hester became aware of the existence of the plaintiff. Indeed, plaintiff continually argues to the contrary, and does not dispute that the surveillance was done pursuant to long standing policy and directives that were channelled through the chain of command.

The Court will assume that the statements made in telephone conversations would permit a finding of malice or ill-will on the part of the defendant. Those motivations are not relevant, however, to the question of whether the defendant is liable for the tort of wrongful interference with business relations under Arkansas law. As noted in *Mason v. Funderburk, supra,* the malice that is required for this tort is "malice in its technical legal sense, that is, the intentional doing of a harmful act without justification or excuse, and does not necessarily include actual malice, that is malice in the sense of spite or ill will." 247 Ark. at 526. Assuming Mr. Hester's spite or ill will, there is no factual dispute as to the true motivations behind the actions taken. As noted in *Bennett, supra,* a public official has the privilege to interfere in the business of another when he acts in the "protection of the public interest." 274 Ark. at 214-b.

The Court notes parenthetically that its conclusion that the actions were taken for law enforcement purposes in

the public interest is supported by its review of the videotape of the television interview. The entire context of Mr. Hester's remarks suggests that the laws of Tennessee, and the loss of revenue to its citizens, were the motivating fcators behind the action.

Defendant Gammon

As previously noted, Edward Gammon was one of the agents who conducted the surveillance on the Liquor Center. His deposition reveals the following facts.

Prior to 1979, Mr. Gammon stated that he went to West Memphis "once in a great while." Those visits were triggered by advertisements by West Memphis liquor dealers in Memphis newspapers advertising lower prices. (Gammon dep. at 5). In general, on these trips to West Memphis Mr. Gammon stated that he would set up a surveillance point somewhere away from the particular liquor store. (Gammon dep. at 6). After the Liquor Center began advertising in the Memphis Commercial Appeal, everyone in the Memphis office (Hester, Wright, Gammon, and Warren Bond, another agent) began discussing proper enforcement procedures. (Gammon dep. at 15). The discussions were general, and no specific orders were given on the nature and extent of surveillance. "I guess they sort'a assumed I would know what to do and when to do it." (Gammon dep. at 14). Mr. Gammon verified that complaints were constantly received from Memphis liquor stores and that those complaints were part of the reason for the enforcement. "That, and it's a violation of the law." (Gammon dep. at 17). He contends that the surveillance was maintained at a safe distance; he only entered the McGee premises once and that was to drive through the parking lot. Other than that, he drove by on the road or observed customers from an observation point at a nearby subdivision.

(Gammon dep. at 12-13). After the injunction was entered, Mr. Gammon never went to West Memphis and observed customers at the Liquor Center without being a paying customer at some nearby business establishment.

The plaintiff's version of Mr. Gammon's actual participation is somewhat different. He maintains, in a sworn affidavit, that Mr. Gammon actually entered the store on a number of occasions and "walked around" and observed the customers. This is also the conclusion of the affidavit of Linda Estes, an employee of Mr. McGee.

In Mr. McGee's deposition, he discusses his interpretation of Mr. Gammon's surveillance practices. According to the plaintiff, the defendant began coming to the Liquor Center in mid-July 1979, and was seen on an average of two or three times a week until the temporary restraining order was entered in October. (McGee dep. at 84-5). "Mr. Gammon would drive the car up on the parking lot and get out and come in the store because you couldn't see anything from Broadway . . . . Sometimes he'd come in the store and sometime he'd just pull up out front and sit around for a while." (McGee dep. at 83-5). Mr. McGee states that he never talked to any of the customers, either in the store or outside. When asked whether Mr. Gammon "in any way annoy[ed]" the customers, Mr. McGee replied: "Oh, he walked around and observed the customers and like that." (McGee dep. at 18).

With respect to Mr. Gammon's immunity from suit under section 1983, the Court must again ascertain whether he knew, or should have known, that his actions would violate Mr. McGee's clearly established constitutional rights. On the basis of the law previously discussed, the Court concludes that Mr. Gammon should not have known that his actions would violate the plaintiff's constitutional

rights. The Court sees no valid reason for distinguishing between Mr. Gammon and the other defendants. The allegedly intrusive nature of his surveillance, assuming that Mr. McGee's version is correct, does not suggest that the defendant's knowledge that he would be violating the plaintiff's constitutional property rights would be any greater than that of his superiors. With respect to the plaintiff's constitutional right to earn a living and operate his business, there was no valid basis for Mr. Gammon to conclude that his actions were unlawful.

With respect to the pendent tort claim, the Court once again focuses on whether the defendant was privileged to interfere by acting in the public interest. The conclusion with respect to Gammon is the same as the other defendants—the actions were motivated out of good faith law enforcement to protect the citizens of the State of Tennessee. The plaintiff indicated in his deposition that he had no contact with Mr. Gammon, other th his official actions in observing customers of the Liquor Center. The plaintiff has offered no evidence that the defendant's motives were other than a desire to enforce the liquor and revenue laws of Tennessee. The only evidence before the Court on this issue is from the defendant. Mr. Gammon was asked: "Was it your opinion that the purpose for surveillance in West Memphis and subsequent arrests in Tennessee was for the purpose of enforcing Tennessee laws?" He replied: "Absolutely." (Gammon dep. at 48).

Assuming the truth of the plaintiff's version, the Court is satisfied that the privilege should extend to the activities undertaken by Mr. Gammon. The purpose of entering the plaintiff's premises was to observe Tennessee customers and eventually arrest them for actually vio-

lating Tennessee law. The purpose may also have even been to discourage Tennessee customers from purchasing liquor at Arkansas liquor stores in general or at Mr. McGee's business in particular. Those are, in the Court's view, permissible purposes undertaken in good faith, which shield the defendant from liability for damages under the principles announced in *Bennett*.

It may well be that actually observing customers in the business establishment was overly intrusive surveillance. It may also be that under some legal theories those actions would form the basis for some temporary equitable relief, as the Crittenden County Chancery Court obviously concluded. That is not this lawsuit, however. The Court is here asked to determine whether Mr. Gammon's actions subject him to liability for damages under the Arkansas law of wrongful interference with business relations. The answer is no, as a matter of law.

Injunctive Relief

The Court still has before it the plaintiff's request for permanent injunctive relief. Defendants Jones and Fry, who are still Commissioners of the ABCC, have addressed this claim for relief in their motions for summary judgment. They maintain that the point is moot, because all surveillance has since been discontinued. According to their motion, there is no longer a price differential between the two states, and there is accordingly no need to maintain surveillance.

The plaintiff has responded by filing his own motion for summary judgment on the issue of injunctive relief. He does not dispute that the surveillance has been discontinued, or that the price differential between Arkansas and Tennessee has been eliminated. To the contrary,

the plaintiff argues that because there is no longer a need for the surveillance, "the defendants have no reason to object to an injunction . . . and there is no material fact or question to prevent the issuance of said injunctive relief." (Plaintiff's brief in support of motion for summary judgment). The plaintiff also argues that an injunction is necessary to prevent multiplicity of lawsuits in the event surveillance is resumed sometime in the future.

The request for injunctive relief will be denied, as will the plaintiff's motion for summary judgment. This Court will permanently enjoin an activity only if it is convinced that the harm complained of is present and ongoing. If the irreparable harm complained of has ceased to be a problem, the remedy of a permanent injunction is not appropriate.

Conclusion

The Court is prompted to make a few comments in conclusion. This case has taken over two and a half years to reach this point. A great deal of time and energy has been expended by the parties and their attorneys. Discovery has no doubt been time-consuming and expensive for all involved. Because of those facts, disposition of this case on summary judgment is somewhat troubling. With respect to the section 1983 claims, the Court has been guided by the objective standard articulated by the Supreme Court in *Harlow v. Fitzgerald, supra.* That decision did specifically state that the objective standard for analyzing good faith immunity should allow insubstantial claims to be resolved on motions for summary judgment. The Court also contemplated, however, that such an objective analysis would allow the disposition of

such claims without extensive discovery into the actual knowledge and motivations of government officials, and without being "disruptive of effective government." 50 U.S.L.W. at 4280. But such discovery was not curtailed in this case.

Unfortunately, *Harlow* was not available at the time the Court ruled on the motion to dismiss and discovery began. Because the plaintiff alleged malice, the case proceeded through the lengthy discovery process.

Perhaps all of this could have been avoided, with the same result the Court has reached here, had the defendants moved alternatively for summary judgment at the same time that they moved to dismiss. Federal Rule of Civil Procedure 12(b) provides that if "on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Had the attorneys moved for such alternative relief, supported with the affidavits of the parties (to the same effect as their relevant deposition testimony), all the issues would have been before the Court, and a great deal of time and energy on everyone's part might well have been saved.

It is therefore Ordered that the motion of the defendants C. A. Jones and S. W. Fry for summary judgment be, and it is hereby, granted.

It is further Ordered that the motion of defendant Susan Simons for summary judgment be, and it is hereby, granted.

It is further Ordered that the motion of defendant Joe Hester for summary judgment be, and it is hereby, granted.

It is further Ordered that the motion of defendant Edward Gammon for summary judgment be, and it is hereby, granted.

It is further Ordered that all dismissals, including the order of dismissal of the section 1983 claims with respect to defendants Simons, Jones and Fry entered on August 30, 1982, be with prejudice.

It is further Ordered that the plaintiff's request for injunctive relief be, and it is hereby, denied. Accordingly, it is also Ordered that the plaintiff's motion for summary judgment be, and it is hereby, denied.

Dated this 27th day of September, 1982.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX E

(Filed April 6, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1270/1645/1646EA

Ben McGee, etc.,
Appellant/Cross-appellee,

v.

Joe Hester, etc.,
Appellee/Cross-appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court is affirmed as to liability and damages and modified as to the award for attorney's fees and costs in accordance with the opinion of this Court.

April 6, 1987

/s/ Robert D. St. Vrain

A true copy.

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX F

(Entered June 18, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1270/1645/1646EA

Ben McGee, etc.,
Appellee/Cross-appellant,

vs.

Joe C. Hester, etc.,
Appellant/Cross-appellee.

Appeals from the United States District Court for the
Eastern District of Arkansas.

Appellant/cross-appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges Donald R. Ross, John R. Gibson, Pasco Bowman and Frank Magill would have granted the petitions.

Petition for rehearing by the panel is also denied.

June 18, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX G

(Entered June 29, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1270/1645/1646-EA

Ben McGee, d/b/a The Liquor Center,
Appellee,

vs.

Joe C. Hester, Agent-in-Charge, etc.,
Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas

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It is ordered by the Court that counsel shall be awarded the following amounts in these above cases:

Clint Saxton: $4,000

John Walker: $4,000 for work on first appeal
$2,500 for work on second appeal

No fees are awarded to any other counsel who took part in the preparation of the appeals in these cases.

June 29, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of
Appeals, Eighth Circuit

No. 87-448

In The

Supreme Court of the United States

October Term, 1987

JOE HESTER, Agent-in-Charge,
WESTERN DISTRICT OF TENNESSEE
ALCOHOLIC BEVERAGE COMMISSION,

Petitioner,

vs.

BEN McGEE d/b/a THE LIQUOR CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eighth Circuit erred in determining that there was substantial evidence to support the jury verdict finding that Respondent, Ben McGee, was entitled to damages for *both* his federal claim brought pursuant to 42 U.S.C. § 1983 and his non-federal common law state claim for intentional interference with his business.

2. Is the Judgment supported by the non-Federal state tort claim separate and apart from the Federal Claim?

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No. 87-448

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

JOE HESTER, Agent-in-Charge,
WESTERN DISTRICT OF TENNESSEE
ALCOHOLIC BEVERAGE COMMISSION,

Petitioner,

vs.

BEN McGEE d/b/a THE LIQUOR CENTER,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

Respondent Ben McGee respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

—o—

OPINIONS BELOW

The second opinion of the Court of Appeals is included in the Appendix, page A1 of the Petition. It is reported at 815 F.2d 1193 (1987). The first opinion of the Court of Appeals is included in the Appendix, pages A16-A23 and is reported at 724 F.2d 89 (1983). A Petition for Rehearing was filed and disposed of by entry of an Order on June 18, 1987, denying rehearing.

———o———

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

STATUTES INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured to an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

———o———

STATEMENT OF THE CASE

Respondent Ben McGee was operating a retail liquor store in West Memphis, Arkansas, in 1979. In July of 1979, he called Petitioner Joe Hester, who was in charge of the Memphis office of the Tennessee Alcoholic Beverage Control Commission, complaining of the surveillance activities at his store. In telephone conversations with Petitioner Hester, McGee was told by Petitioner Hester that Hester would put McGee out of business. (Tr. 36). Hester also told McGee that if McGee lived in Tennessee that Hester would put him in jail. (Tr. 31). Petitioner Hester laughed at the complaints made by McGee. (Tr. 35).

McGee's store was located four hundred forty feet off U.S. Highway 70 in West Memphis, Arkansas. (Tr. 25). Agents of the Tennessee ABC were sent by Hester two to three times per week to McGee's store. (Tr. 37). The agents came in unmarked cars, with blackwall tires, small hubcaps and antennas and would stay parked three to five feet from the front door of McGee's store. (Tr. 37, 38). The agents used what appeared to be field glasses or cameras in observing customers. (Tr. 83). Agents were observed talking to McGee's customers. (Tr. 55). McGee was informed by customers that agents were outside with cameras. (Tr. 56). Agents wrote down license numbers of customers. (Tr. 38). Agent Gammon came into the store observing customers and what the customers had in their shopping carts. (Tr. 84, 89). Agent Wright directed a professional photographer to take pictures of McGee's business. (Dep. Ex. 7, pgs. 26, 28, 29). Petitioner Hester also made use of the media in his efforts against McGee including a radio talk show, television report and a newspaper article. (Tr. 40, 305, Pl. Ex. 4).

The activities complained of by McGee continued from July of 1979 until October of 1979 when McGee obtained an injunction in state Court. After obtaining the injunction, agents continued their surveillance activities. Agent Gammon testified about conducting surveillance while enjoined from doing so by stating:

> "To be honest with you, you know I wasn't over there buying a coca-cola or $2.00 worth of gas. I was trying to conduct state business without violating Arkansas law." (Tr. 40).

The presence of the agents was easily recognized by the customers without the help of McGee or his employees. (Tr. 109, 110). The presence of the agents made customers uncomfortable and deterred customers from purchasing goods from McGee. (Tr. 108, 120, 247). Customers did not like to be watched and harrassed while at McGee's store. (Tr. 97, 113, 119).

The activities carried out at Petitioner Hester's direction resulted in a dramatic loss of business. (Tr. 43, 44, 45, 84; Pl. Ex. 9 and 10).

The very day that McGee obtained an injunction in State Court Hester stated in an interview aired on the six o'clock news that Hester sincerely hoped that McGee's business had been injured because that was the intended purpose of the surveillance. (Pl. Ex. 4).

Subsequent to the injunction against Hester and other defendants being granted in state Court, Hester and the other defendants removed the action to the U.S. District Court for the Eastern District of Arkansas. McGee amended his Complaint seeking compensatory and punitive damages from Hester on *both* a federal claim (42 U.S.C. § 1983)

for deprivation of property without due process *and* a pendent state tort claim for intentional interference with his business.

The District Court granted summary judgment for Hester. McGee appealed the decision of the District Court to the Eighth Circuit Court of Appeals.

In *McGee v. Hester*, 724 F.2d 89, 8th Cir. (1983) (Pet. App. A16-A23), the Eighth Circuit found the following:

1. That the claim made by McGee was not a "insubstantial" claim contemplated by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (Pet. App. A20);

2. The objective tests of *Harlow* had been met by McGee. (Pet. App. A20);

3. That McGee had a clearly established property right of which a reasonable person would have known. (Pet. App. A20);

4. That the pendent state tort claim of intentional interference with McGee's business should be determined by the jury. (Pet. App. A22);

5. Found the facts of *Berbiglia v. Cheney*, 249 F.Supp. 258 (W.D. Mo. 1965), to be completely different from the facts presented by McGee. (Pet. App. A20);

6. That the injunctive relief sought by McGee was *moot* because the surveillance by Tennessee officials had ceased due to the fact that there was no longer a price differential existing between Arkansas and Tennessee. (Pet. App. A22);

7. McGee was not violating any Tennessee law. (Pet. App. A21).

In June of 1985 after three days of trial, the District Court submitted special interrogatories to the jury instead

of a general verdict. The District Court felt that submitting the case on special interrogatories would reduce the number of required instructions and "also give focus to the factual issues actually raised by the evidence during the course of the trial." (Pet. App. A27).

In answering the special interrogatories, the jury made the following specific findings of fact:

1. Hester told McGee that he was going to put McGee out of business;

2. Hester, in directing the ABC surveillance program, had a personal, conscious intent to harm McGee or McGee's business;

3. Hester intentionally singled out McGee and his business for surveillance activities;

4. In carrying out his surveillance activities, Hester did not believe in good faith that he was not violating McGee's constitutional rights;

5. Hester instructed his agents to employ overt and intrusive surveillance techniques to frighten away legitimate customers from McGee's business;

6. The overt manner in which the ABC's surveillance activities were conducted resulting in frightening legitimate customers away from McGee's business;

7. ABC agents visited McGee's business one to three times per week from July 1, 1979, through October 10, 1979;

8. ABC agent Gammon parked his unmarked, government vehicle directly in front of McGee's store;

9. Hester personally directed or acquiesced in the particular surveillance tactics employed by the ABC agents;

10. McGee purposefully solicited Tennessee customers to purchase liquor from his store knowing that the customers' import of the liquor into Tennessee would violate Tennessee law;

11. McGee did not offer to indemnify Tennessee customers for losses suffered as a result of transporting liquor purchased at his store into Tennessee;

12. McGee sustained losses of $7,753 as a direct and proximate result of Hester's surveillance activities;

13. Publicity surrounding the ABC's arrests and surveillance, as well as customers' first hand observance of those activities, deterred prospective customers from McGee's store;

14. McGee sustained damages through the loss of Arkansas, and other non-Tennessee customers, as well as from Tennessee residents who did and did not intend to return to Tennessee with the liquor. (Pet. App. A5-A6, A27-A33).

Because the above stated interrogatories were answered in favor of McGee, the District Court submitted the issue of punitive damages to the jury. The jury returned punitive damages in the amount of $50,000.

Consistent with the findings of the jury, the District Court entered judgment for McGee for compensatory damages in the amount of $7,573 and punitive damages in the amount of $50,000.

Hester's post trial Motion for Judgment N.O.V. or New Trial was denied upon the entry of Judgment for McGee in the sum of $1,500 compensatory damages, $50,000 punitive damages and attorney fees.

Hester appealed and the Eighth Circuit in *McGee v. Hester*, 815 F.2d 1193 (8th Cir. 1987), (Pet. App. A1-A15),

affirmed the results of the lower Court proceeding and found among other things that:

1. The evidence was sufficient to support the verdict on liability for *both* deprivation of property under Federal law and intentional interference with a business under Arkansas law. (Pet. App. A8);

2. That the evidence presented is "substantial" under either the Federal or Arkansas law concerning sufficiency of evidence. (Pet. App. A8);

3. That the jury resolved any disputed evidence in McGee's favor. (Pet. App. A8);

4. Restated its previous findings that McGee was not claiming an "insubstantial claim" contemplated by *Harlow*. (Pet. App. A5);

Hester's Petition for Rehearing was denied.

———o———

REASONS FOR DENYING THE WRIT

There are two real issues presented by this case, sufficiency of evidence and adequate state ground for relief. The Petitioner is seeking certiorari for the limited purpose of having this Court review *de novo* the extensive record below to determine whether the Eighth Circuit Court of Appeals erred in applying the facts presented in this case to the objective tests set out by *Harlow*. McGee prevailed on his pendent state tort claim of intentional interference with his business and therefore the Judgment is based on adequate state grounds separate and apart from the Federal claim. The facts presented in this case are unique to the parties and are of interest only to the parties. The decision by the Eighth Circuit was correct.

1. The first real issue involved in this case relates to the sufficiency of evidence. The Eighth Circuit found in its first opinion that the objective tests required in *Harlow* had been met by the allegations made by McGee and further that the claim of McGee was not an "insubstantial claim" as contemplated by *Harlow*. The Eighth Circuit also found that McGee had a clearly established property right of which a reasonable person would have known. Petitioner makes reference to *Davis v. Scherer,* 468 U.S. 183 (1984). *Davis* does not change any of the reasoning or rationale contained in *Harlow*. *Davis,* in fact, relies on *Harlow*. The District Court at trial was very careful in submitting special interrogatories to the jury in lieu of a general verdict. The jury resolved all disputes of fact with its specific findings in favor of McGee. The Eighth Circuit found in its second opinion that the evidence submitted by McGee on *both* the federal and non-federal claim was substantial. In the present case, the facts have been resolved twice in favor of McGee. This Court has ruled that it will not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

2. McGee prevailed on both his Federal (42 U.S.C. § 1983) claim and his non-federal state tort claim of intentional interference with his business. The Eighth Circuit specifically found that there was substantial evidence to support recovery on both theories. (Pet. App. A8) Clearly, McGee prevailed on the non-federal ground which was independent of the Federal ground and adequate to support the Judgment. In such cases, this Court has refused to grant certiorari. *Fox Film v. Muller,* 296 U.S. 207 (1935); *Wilson v. Loew's, Incorporated,* 355 U.S. 597 (1958);

Board of Supervisors of Fairfax County v. Allman, Trustee, 423 U.S. 940 (1975).

3. The particular facts presented in this case are unique to these parties. The Petitioner argues in his Petition that certiorari should be granted because of the failure to show that McGee had a "clearly established right." The Eighth Circuit specifically found that McGee had a clearly established property right. (Pet. App. A20) Petitioner also points out that the decision reached would curtail future surveillance activities by law enforcement officers and more particularly the State of Tennessee. The Eighth Circuit found in its first opinion that the injunctive relief sought was moot because the State of Tennessee had discontinued surveillance activities because the price differential between Arkansas and Tennessee no longer existed. (Pet. App. A22) Further, any law enforcement officer desiring to carry on surveillance activities would not call the party to be surveilled and tell that party that the officer was going to put him out of business. No law enforcement officer conducting legitimate surveillance activities would conduct the activities in the manner carried out by Petitioner Joe Hester. To carry out surveillance activities as conducted by Joe Hester would defeat the purpose of surveillance.

4. The decision reached is a correct one. McGee was operating a lawful business in the State of Arkansas. The Eighth Circuit specifically found that he was violating no law of the State of Tennessee. No "public official" should be allowed to hide behind his position and escape responsibility for activities such as those carried out by the Petitioner.

———o———

CONCLUSION

Therefore, as the Petition for Writ of Certiorari fails to raise arguments which meet the standards for granting certiorari, it must be denied. Fees and costs should be assessed for opposing the Petition.

Respectfully submitted,

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